Nos. 92-155 and 92-219

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Appellants,

v.

NICK THEODORE, *et al.*,

Appellees.

CARROLL A. CAMPBELL, JR., GOVERNOR OF SOUTH CAROLINA,

Appellant,

v.

NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

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MOTION TO DISMISS OR AFFIRM

GEDNEY M. HOWE, III, P.A.
8 Chalmers Street
Charleston, S.C. 29402
(803) 722-8048

ANDREW P. MILLER
(Counsel of Record)
MARK A. PACKMAN
MELINDA BURROWS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

FRED THOMPSON, III
SCARDATO & THOMPSON
151 Meeting Street
Charleston, S.C. 29402
(803) 723-9600

Attorneys for Appellee South Carolina Senate

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QUESTIONS PRESENTED

(1) Did the court below properly determine that the plan it drew for the South Carolina Senate did not have a discriminatory effect under Section 5 of the Voting Rights Act by applying the retrogression test announced by this Court in *Beer* v. *United States*, 425 U.S. 130 (1976), and *City of Lockhart* v. *United States*, 460 U.S. 125 (1983)?

(2) Did the court below, in fashioning its redistricting plan for the South Carolina Senate, give adequate consideration to Section 2 of the Voting Rights Act when it designed a plan so as not to violate the threshold requirements for liability under Section 2 established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986)?

(3) Did the court below properly determine that, in fashioning its plan for the South Carolina Senate, it was not required to maximize minority voting strength?

(3) Assuming *arguendo* that maximization is required, did the court below, in fashioning its plan for the South Carolina Senate, create the maximum number of districts in which black voters have the potential to elect a candidate of their choice, as defined by *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and other cases interpreting Section 2 of the Voting Rights Act?

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INTRODUCTION

In this case, Plaintiffs-Appellants Statewide Reapportionment Advisory Committee, *et al.* ("SRAC") and Defendant-Cross-Appellant Carroll A. Campbell, Jr., the Governor of South Carolina (collectively, "Appellants"), appeal the order of a three-judge court which issued an injunction redistricting the South Carolina Senate and House of Representatives and the State's six Congressional districts.[1] Appellants argue that the three-

[1] Because the Governor was named as a defendant below, he is a cross-appellant in this Court; however, he seeks much the same

judge court failed to give adequate consideration to the requirements of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, which prohibits voting laws that result in discrimination against blacks and other protected minority groups by denying them an equal opportunity "to participate in the political process and to elect representatives of their choice." Appellant SRAC claims further that the court consequently failed to maximize the number of black majority districts, as supposedly mandated by Section 2. Because Appellants' arguments are without merit, Appellee South Carolina Senate ("the Senate") moves that the appeal be dismissed or, in the alternative, that the judgment of the three-judge court be affirmed.

STATEMENT OF THE CASE

I. BACKGROUND AND PROCEDURAL HISTORY

South Carolina's General Assembly is composed of a House and a Senate. *Burton v. Sheheen*, No. 3:91-2983-1 (D.S.C. May 1, 1992) (to be reported at 793 F. Supp. 1329) (three-judge court), reproduced in Appendix to SRAC Jurisdictional Statement ("SRAC App.") 4. The Senate has 46 members, who are elected from single-member districts. SRAC Jurisdictional Statement ("SRAC J.S.") 12.

The Senate was last reapportioned in 1984. After a three-judge court adopted an interim redistricting plan with nine black majority districts and held that this plan satisfied Section 2, *Graham v. South Carolina*, No. 3:84-1430-15 (D.S.C. July 31, 1984) (copy lodged with this Court), the General Assembly passed a plan that created ten black majority districts. SRAC App. 5, 27 n.34. Of these ten districts, seven had a black majority voting age population ("VAP"). SRAC App. 27 n.34. The Gov-

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relief as the SRAC. Appellants do not challenge the three-judge court's proposed Congressional districts, but rather only the plans for the Senate and House. The Senate will address only those arguments relating to the three-judge court's plan for the Senate.

ernor signed the plan into law, and the United States Attorney General "precleared" it pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.[2]

Following the 1990 census, which revealed that the districts drawn in 1984 had become substantially unequal in population, the Senate set about the task of redistricting. The Senate Judiciary Committee's seven-member Subcommittee on Redistricting and Reapportionment (which included one black member and two Republicans) held extensive public hearings, in order to obtain the views of citizens and interested groups regarding redistricting. The Subcommittee also adopted a set of neutral criteria to guide it in formulating redistricting plans. These criteria included drawing districts of equal population (the "one person, one vote" rule) and complying with the Voting Rights Act. Following the hearings, the Senate passed a redistricting plan for itself and a Congressional redistricting plan. The plans were introduced in the House, but the House was unable to act on them before the General Assembly's statutorily mandated *sine die* adjournment date of June 6, 1991. S.C. Code Ann. § 2-1-180 (Law. Co-op. 1986).

On October 4, 1991, Michael Burton, the Executive Director of the South Carolina Republican Party, brought an action challenging the continued use of the 1984 Senate districts, as well as the Congressional and House districts drawn after the 1980 census. *Burton v. Sheheen*, No. 3:91-2983-1 (D.S.C. filed Oct. 4, 1991). The complaint alleged that these districts violated the one person, one vote rule and Section 2. The complaint further

[2] Section 5 requires certain jurisdictions, including South Carolina, to obtain prior approval, known as "preclearance," of changes in laws, practices, or procedures affecting voting. *See Georgia v. United States*, 411 U.S. 526 (1973) (holding that Section 5 applies to redistricting plans). To obtain preclearance, such jurisdictions must prove either to the United States Attorney General or to a three-judge district court in the District of Columbia that the proposed change has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. § 1973c.

alleged that the General Assembly was deadlocked on the issue of redistricting and that judicial action to implement redistricting plans was therefore necessary. The complaint sought declaratory relief, an injunction against the further use of these districts, and an order implementing Congressional and State legislative redistricting plans to be offered by plaintiffs. The Senate moved to intervene pursuant to Fed. R. Civ. P. 24, and the motion was granted on November 13, 1991.

On October 31, 1991, the SRAC brought its own redistricting suit, *Statewide Reapportionment Advisory Committee v. Campbell*, No. 3:91-3310-1 (D.S.C. filed Oct. 31, 1991), making substantially the same allegations as the *Burton* plaintiffs.[3] The two suits were consolidated for trial before a three-judge panel, consisting of Circuit Judge Clyde Hamilton, Chief District Judge Falcon Hawkins, and District Judge G. Ross Anderson, Jr., that had been appointed pursuant to 28 U.S.C. § 2284.

After the General Assembly reconvened on January 14, 1992, it moved quickly on reapportionment and passed a plan for the Senate on January 29, 1992. The Governor vetoed the plan and the veto was sustained. With respect to Congressional redistricting, the House and Senate passed separate plans. A conference committee was appointed, but was unable to reach agreement. As a consequence of the apparent impasse, the three-judge court undertook to devise its own Congressional and State legislative redistricting plans.

II. THE TRIAL

The trial commenced on February 19, 1992, and continued through March 6. At the outset, all parties stipulated that the existing Congressional and State legislative districts (*i.e.*, those adopted following the 1980

[3] While neither complaint asserted Section 5 of the Voting Rights Act as a basis for jurisdiction, the SRAC concedes that it contended below that "any plan adopted by the court must comply with Sections 2 and 5 of the Voting Rights Act." SRAC J.S. 5.

census) were malapportioned and could no longer be used. SRAC App. 3 n.2. The stipulation obviated the need for the court to reach the claim that these districts also violated Section 2 of the Voting Rights Act. SRAC App. 3 n.2. Rather, given this threshold stipulation, the court's task was to implement a plan that remedied the one person, one vote violation while complying with all other legal requirements, including the Voting Rights Act.

The court's task was a massive one, which had to be undertaken in the face of tight time constraints. Primary elections were scheduled for June 9, 1992, as required by S.C. Code Ann. § 7-13-40 (Law. Co-op. Supp. 1991), and State legislative and Congressional candidates were required by law to file notices of candidacy by March 30 and April 30, 1992, respectively, S.C. Code Ann. § 7-11-210 (Law. Co-op. Supp. 1991). To alleviate some of the time pressure, the court postponed the primary until August 25 and the filing deadlines until June 25. SRAC App. 86 n.79. Even with this delay, the court still faced a substantial task, which was made even more difficult by the fact that the parties offered nine proposed plans for Congress, five for the House, and five for the Senate.[4] During the three weeks of hearings, the court heard lay and expert testimony from numerous witnesses and received hundreds of exhibits totalling in the thousands of pages.

The SRAC advocated a plan for the Senate that its drafter freely admitted was designed to maximize numerically black representation. Senate Appendix ("Sen. App.") (attached hereto) 16a, 17a-18a, 22a. Contending that a district generally had to be 58% black in total population in order to give blacks an equal opportunity to elect candidates of their choice, Sen. App. 17a,

[4] Senate plans were offered by the SRAC, the Governor, the Senate, the Lieutenant Governor, and the *Burton* plaintiffs (on behalf of the Republican Party). SRAC J.S. 12. Because only the SRAC and the Governor have appealed, only their plans will be addressed in this brief.

the SRAC drew as many districts as possible that exceeded this percentage. The SRAC plan for the Senate contained a total of 14 black majority districts, of which 12 had a black VAP majority. *See* SRAC J.S. 12 (chart comparing the various plans for the Senate).

Like the plan ultimately drawn by the three-judge court (which is depicted at Sen. App. 41a), the SRAC plan (which is depicted at Sen. App. 42a) placed eleven black majority districts in areas with naturally occurring, compact, and contiguous black population concentrations. Unlike the court's plan, however, the SRAC plan drew three additional black majority districts by stringing together scattered pockets of minority population with no community of interest. The SRAC plan included a district in the Savannah Valley (SRAC District 10) which stretched for almost 100 miles beginning in Anderson County[5] and extending through six other counties along the Georgia border; a district winding northward from the suburbs of Columbia in the central part of the State all the way to Spartanburg County near the North Carolina border (SRAC District 15); and a district created by roping minority concentrations from Georgetown, Horry, Marion, and Williamsburg Counties in the eastern part of the State (SRAC District 34).[6]

[5] A county map of South Carolina is included in the Appendix to the Governor's Jurisdictional Statement 43.

[6] In order to make this district an "open" one (*i.e.*, without an incumbent), the SRAC plan put two white incumbents together in an adjacent district. The drafter of the SRAC plan, Dr. John Ruoff, admitted that he would not have paired these two incumbents if they had been black. Sen. App. 39a. While conceding that whites could represent blacks and that both these incumbents represented districts with "pretty solid" black majorities, Dr. Ruoff explained that he was not seeking to protect existing black majority districts but rather to protect existing black majority districts that were electing blacks. Sen. App. 24a-25a.

The Governor advocated a plan (which is depicted at Sen. App. 43a) that contained two more black majority districts than in the three-judge court's plan (Governor's Districts 10 and 34) in roughly the same areas as SRAC Districts 10 and 34. The Governor's plan pitted ten Democratic Senators against each other. SRAC App. 65 n.61.

Appellants argued that the creation of the additional black majority districts was justified (and, in fact, required) because of allegedly extensive racial bloc voting in South Carolina.[7] At the urging of the court, the parties stipulated that "since 1984 there is evidence of racially polarized voting in South Carolina." SRAC App. 56. The SRAC and the *Burton* plaintiffs also offered expert testimony that voting in South Carolina is highly polarized along racial lines. The SRAC is wrong, however, to characterize this evidence as "unrebutted." SRAC J.S. 6. Counsel for the Senate, the Lieutenant Governor, and the South Carolina Democratic Party demonstrated through cross-examination that the evidence of racial bloc voting in the three additional districts that the SRAC and/or the Governor sought to create was simply inadequate.[8]

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[7] In *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986), this Court defined racial bloc voting as a consistent relationship between the race of the voter and the way he or she votes.

[8] With respect to those districts, the *Burton* plaintiffs' expert Dr. Theodore Arrington admitted that he had analyzed only one election, the 1990 general election for Governor, in which State Senator Theo Mitchell, who is black, lost to Carroll Campbell, a highly popular white incumbent. Sen. App. 1a. As the court properly found, "the testimony regarding the strength of polarization exhibited in some races, such as the 1990 governor's race, was minimized by factors such as incumbency." SRAC App. 56. Moreover, for some reason, Dr. Arrington did not analyze the 1990 Democratic primary for Governor, in which Senator Mitchell beat a white opponent. Sen. App. 5a.

Dr. James Loewen, who testified as an expert for the SRAC, analyzed no elections after 1984. SRAC J.S. 6-7. He made no study

Even assuming that the plaintiffs had offered credible evidence of racial bloc voting (or, alternatively, that the parties' general stipulation sufficed to prove the existence of bloc voting in the particular areas under dispute), there was still substantial evidence that the additional black majority districts proposed by the SRAC and by the Governor were "illusory," in that they would not have resulted in the election of additional black Senators. Both plans sought to draw the additional districts by ignoring county lines, traditional communities of interest and naturally occurring compact areas of minority strength. Instead, they roped together diverse areas of minority population without regard to any other factor.

For example, the three-judge court found that the *Burton* plaintiffs' proposed District 10, which is highly similar to District 10 in both the SRAC and the Governor's proposed plans, "cuts into seven counties to garner black voters, and consolidates three insular and historical communities of interest." SRAC App. 63-64. The court described this district as "a particularly egregious example of the Governor's and the Republican Party's disregard for county lines and communities of interest . . . [because] the urbanites of Anderson County would be grouped with the rural communities of Abbeville County [and] the pulpwood farmers of McCormick County would

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of blacks who have been successful in winning election to the General Assembly, was unaware that certain of the districts he did analyze were now represented by blacks, and performed no analysis of any of the plans that were offered to the three-judge court. Sen. App. 13a-15a.

Dr. John Ruoff, another one of the SRAC's experts, agreed with Drs. Arrington and Loewen that racial polarization existed. Yet he performed no analysis of whether voting was polarized in the proposed Savannah Valley district. Sen. App. 35a. With regard to the proposed District 34, he did no analysis of elections in Georgetown County and further admitted that the black community in Williamsburg County was able to elect candidates of its choice despite polarized voting. Sen. App. 33a-35a, 36a. He also admitted to numerous examples of successful black candidacies in cities within the proposed district north of Columbia. Sen. App. 28a-33a.

share representation with the industrial workers of Aiken County." SRAC App. 63-64; *see also* Sen. App. 6a-7a (Testimony of Michael Couick, Director of Research and Attorney for the Senate Judiciary Committee) (District 10, as drawn by the SRAC, the Governor, and the *Burton* plaintiffs, was not an electable minority district due to a combination of factors, including a high number of split precincts, an unacceptable geographic stretch, a lack of unified communities of interest, and the lack of a core existing district).

Similarly, the district proposed by the SRAC north of Columbia (District 15) lacked a community of interest. This proposed district was created by fracturing a compact, cohesive, predominantly black area into two districts (Districts 15 and 17) and splitting precincts and adding disparate groups of black voters with no community of interest to increase the black percentage of the population. *See* Sen. App. 11a-12a.[9]

The majority black districts proposed by the SRAC and the Governor in the eastern part of the State likewise disrupted existing communities of interest and diluted black voting strength in adjacent districts. SRAC District 34 fractured Williamsburg County, a black majority county, into four separate districts, and neighboring Georgetown County, which also has significant black population, into three districts. In so doing, the SRAC split Williamsburg County's cohesive black majority, which has successfully elected numerous black officials. These significant changes to existing political boundaries in order to create an additional majority black district in District 34 also had the effect of fracturing the black population in two adjacent effective black majority districts, raising considerable doubt as to whether any of the three resulting districts would provide sufficient electoral opportunities to black voters. *See* Sen. App. 9a-11a.

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[9] The Governor did not even include this district in his proposed plan.

District 34 in the Governor's plan created a black majority by borrowing black population from neighboring District 30, another black majority district. To make up for the lost population, District 30 had to pick up black voters from Dillon County. Because these voters have a low turnout, however, the Senate, with the support of the black incumbent in District 30, opposed putting them in the district, fearing that they would impair its electability. Sen. App. 10a.

In addition, the additional black majority districts in the SRAC plan and the Governor's plan contained numerous split precincts, which further impaired minority electability in these districts. Though Appellants claimed that splitting precincts was necessary to create the additional black majority districts, the three-judge court heard extensive testimony that split precincts cause enormous confusion among voters, who frequently do not know the district in which they are supposed to be voting. *E.g.*, Sen. App. 6a-7a, 23a. This confusion decreases turnout, which impacts disproportionately on minority voting strength. Sen. App. 2a-5a.

In sum, the evidence showed that, because the additional black majority districts cut through counties and other communities of interest, joined disparate areas without common geographic or social ties, and split precincts, these districts were not effective, electable black majority districts.

ARGUMENT

I. THE THREE-JUDGE COURT PROPERLY HELD THAT ITS PLANS DID NOT HAVE A DISCRIMINATORY EFFECT UNDER SECTION 5 OF THE VOTING RIGHTS ACT

The court below rejected each of the plans proffered by the parties and drew its own plans instead.[10] The three-judge court's plan for the Senate contains eleven districts with black population majorities, an increase of one over the plan passed by the General Assembly and precleared by the Department of Justice in 1984. SRAC App. 68. Ten of these districts have black VAP majorities. SRAC App. 68.

In reaching this result, the court recognized that its remedial plan must be racially fair. The court observed that, under *McDaniel v. Sanchez*, 452 U.S. 130 (1981), it was not required to obtain Section 5 preclearance for its plan. SRAC App. 25. The court also recognized, however, that, in fashioning relief, it "must be cognizant of § 5 concerns that voting changes have neither the 'purpose . . . [nor] the effect of denying or abridging the right to vote' on the basis of race." SRAC App. 25.[11]

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[10] The three-judge court's plan for the Senate had a deviation of only 1.95% between the population of the largest and smallest districts. SRAC App. 61. The court rejected plans offered by the Senate and Lieutenant Governor for having too high a deviation. SRAC App. 61-62 n.58. Relying on the State's policy of preserving county boundaries in redistricting, the court rejected plans offered by the SRAC, the Governor, and the *Burton* plaintiffs for splitting more counties than necessary to comply with the one person, one vote rule. SRAC App. 61-63 & n.58. The court's rulings on the one person, one vote issues are not challenged here.

[11] Appellants contend that the court erred in stating that this case arose under Section 5. SRAC J.S. 22; Governor's Jurisdictional Statement ("Gov. J.S.") 3. As the SRAC admits, however, its position below was that "any plan adopted by the court must comply with" Section 5 (as well as Section 2). SRAC J.S. 5. More important, the issue here is not whether this case arose under Section 5 as opposed to Section 2 but rather whether the court gave suffi-

With respect to purpose, the court stated: "We take it as a given that this court, in fashioning its remedy, is not acting with a racially discriminatory purpose." SRAC App. 25. As for discriminatory effect, the court below employed the "retrogression" test of *Beer v. United States*, 425 U.S. 130 (1976), and *City of Lockhart v. United States*, 460 U.S. 125 (1983), and held that its plans did not have a discriminatory effect under Section 5 because they increased minority voting strength from what it had been under the previous redistricting plans. SRAC App. 25-31, 65-67.

Citing *Wilkes County, Ga. v. United States*, 450 F. Supp. 1171 (D.D.C.), *aff'd mem.*, 439 U.S. 999 (1978), the SRAC argues that, in deciding the retrogression issue, the three-judge court should have compared its plans to those proffered by the parties rather than to the pre-existing plans. SRAC J.S. 18 n.23. As the court observed, however, this approach conflicts with this Court's decisions in *Beer* and *City of Lockhart*. SRAC App. 30 & n.35.

In *Beer*, this Court held that the 1970 redistricting plan for the New Orleans City Council did not have a discriminatory effect under Section 5 because the plan did not diminish black voting strength. 425 U.S. at 141-42. In reaching this conclusion, the Court engaged in a simple comparison of the 1970 plan and its predecessor:

> Under the apportionment of 1961 none of the five councilmanic districts had a clear Negro majority of registered voters . . . . Under [the 1970 plan], by contrast, Negroes will constitute a majority of the population in two of the five districts and a clear majority of the registered voters in one of them. . . . It was therefore error for the District Court to conclude that [the 1970 plan] "will . . .

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cient consideration to the requirements of *both* sections in fashioning its plans. As we demonstrate, a fair reading of the court's opinion shows that it did.

> have the effect of denying or abridging the right to vote on account of race or color" within the meaning of § 5 of the Voting Rights Act.

Id. Similarly, in *City of Lockhart*, in determining whether changes to the city's charter were retrogressive, the Court compared the new system to "the practices in use in Lockhart prior to the new charter." 460 U.S. at 133. In light of these cases, the three-judge court here was clearly correct in rejecting the SRAC's claim that the appropriate comparison is between the court's redistricting plans and those proposed by the parties.[12]

II. THE THREE-JUDGE COURT GAVE MORE THAN ADEQUATE CONSIDERATION TO THE REQUIREMENTS OF SECTION 2

Both the SRAC and the Governor contend that, in drawing redistricting plans, the three-judge court failed to give adequate consideration to the requirements of Section 2 and that the decision below conflicts with the opinions of

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[12] The court below also was correct in holding that *Wilkes County* does not control the present case. In *Wilkes County*, the county sought preclearance for a change from unequally populated single-member districts to at-large elections. Though the county claimed that the change was necessary to cure the malapportionment, the court found that the county had acted with a discriminatory purpose in making the change shortly after blacks began registering to vote in substantial numbers. 450 F. Supp. at 1175-76. Applying *Beer*, the court also found that, when "compared to the use of the existing election districts," the use of at-large elections also produced a discriminatory effect under Section 5 by "reducing the influence of blacks in elections." *Id.* at 1178. Either of these findings was sufficient to deny preclearance, because Section 5 requires the absence of both discriminatory purpose and discriminatory effect. 42 U.S.C. § 1973c. Consequently, the court's additional finding that at-large elections had a discriminatory effect as compared to "options for properly apportioned single-member district plans," 450 F. Supp. at 1178, is *dicta*; and whatever its applicability may be to cases involving changes from single-member districts to at-large elections, it is not controlling in the present case, which does not involve such a change.

this Court and others. SRAC J.S. 18, 22-25; Gov. J.S. 8-13. Neither contention is correct.

The court recognized that "[i]t would be incongruous . . . to adopt a plan which did not comport with the standards and guidelines of § 2." SRAC App. 38. Consequently, the court stated that it would be "guided by the admonition in [*Thornburg v.*] *Gingles* [,478 U.S. 30 (1986),] that a determination [under Section 2] of 'whether the political processes are "equally open" depends on a searching practical evaluation of the "past and present reality." ' " SRAC App. 45 (citations omitted). The court went on to state that "since it would be anomalous for this court to adopt a plan which immediately lends itself to an attack under § 2, our analysis should ensure that the threshold requirements of a § 2 action cannot be established under the adopted plan." SRAC App. 45. Accordingly, in conducting its analysis, the court considered, *inter alia*, (1) "the extent to which reasonable compact and contiguous majority black districts were and could be drawn"; (2) "the extent to which the minority group is politically cohesive"; and (3) "the extent to which racially polarized voting patterns exist." SRAC App. 46.

These three factors are taken almost verbatim from the leading Section 2 case, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), in which this Court held that they were "necessary preconditions" for any challenge to multimember districts. *Id.* at 50; SRAC App. 36 n.37.[13] Although *Gingles* left open the question of whether these preconditions are applicable outside the context of multimember districts, 478 U.S. at 47 n.12, the court below, in accordance with other decisions on this issue, applied them to the single-member districts at issue here.[14] Thus, draw-

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[13] The Governor is thus wrong to imply (Gov. J.S. 12 n.9) that the court below disregarded *Gingles*.

[14] SRAC App. 46; *see, e.g., Nash v. Blunt*, No. 91-0840-CV-W-2, 1992 WL 165162, at *5, *12 (W.D. Mo. July 15, 1992); *Jeffers v. Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989), *aff'd mem.*, 111

ing single-member districts with these preconditions in mind "insure[d] that the court's plan will not violate the threshold requirements for liability under § 2," SRAC App. 47, and (contrary to the Governor's suggestion, Gov. J.S. 12 n.9) made it unnecessary for the court to consider the other evidentiary factors identified in the legislative history of Section 2 (such as a history of racial discrimination, socio-economic disparities between blacks and whites, and success of minority candidates). *See Brewer v. Ham*, 876 F.2d 448, 451, 453 (5th Cir. 1989) (Section 2 challenge fails because plaintiffs failed to prove first *Gingles* precondition); *McNeil v. Springfield Park District*, 851 F.2d 937, 943-44, 947 (7th Cir. 1988) (same), *cert. denied*, 490 U.S. 1031 (1989).[15]

The SRAC argues that the decision of the court below conflicts with other cases holding that court-ordered plans must comply with Section 2. SRAC J.S. 24. By applying the teaching of *Gingles*, however, the three-judge court did address the Section 2 preconditions. Moreover, despite

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S. Ct. 662 (1991); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 589, 592-94 (E.D. Va. 1988); *Wilson v. Eu*, 823 P.2d 545, 565 (Cal. 1992).

[15] Conducting a more detailed Section 2 analysis was not only unnecessary but also impractical in view of the time constraints the court faced. As the court noted, the absence of valid redistricting plans had already necessitated one postponement of the primaries, and the court quite properly felt that it had to implement a plan as soon as possible in order to avoid further delays and allow elections to take place in a timely fashion. SRAC App. 44. Under similar circumstances, the court in *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss.) (per curiam), *aff'd in part and vacated in part on other grounds*, 112 S. Ct. 412 (1991), refused altogether to consider the claims of black voters that the interim redistricting plan adopted by the court violated Section 2. *Id.* at 802-05; *see also Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, Nos. CV-92-1521 (SJ), CV-92-1776(SJ), 1992 WL 174491 (E.D.N.Y. July 10, 1992) (denying motion to enjoin enforcement of redistricting plan alleged to violate Section 2). *See generally Upham v. Seamon*, 456 U.S. 37, 44 (1982) (per curiam).

what the Governor claims, Gov. J.S. 8-13, the analysis used by the court below is consistent with that undertaken by courts in other recent redistricting cases. For example, just as the court here sought to design a plan that "will not violate the threshold requirements for liability under § 2," SRAC App. 47, the court-appointed special masters who drew the plans in *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992), sought to "avoid section 2 challenges to our new districts by eliminating the possibility of a minority group's proving any one of the three [*Gingles*] prerequisites." 823 P.2d at 565. And, like the court here, the court in *DeGrandy v. Wetherell*, No. TCA 92-40015-WS, No. 92-40131 (N.D. Fla. May 29, 1992) (to be reported at 794 F. Supp. 1076 (copy lodged with this Court), recognized its obligation to "consider in crafting the redistricting plan the [S]ection 2 requirement of ensuring that the plan does not dilute the votes of racial or language minorities." *DeGrandy*, slip op. at 7.[16]

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[16] The cases cited by the Governor involving redistricting in Arizona, New York, Texas, and Illinois have likewise relied on the *Gingles* preconditions to guide their choice of redistricting plans. *See Arizonans for Fair Representation v. Symington*, No. CIV 92-256-PHX-SMM, slip op. at 5, 9-11 (D. Ariz. Apr. 30, 1992) (copy lodged with this Court); *Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, Nos. CV-92-1521(SJ), CV-92-1776(SJ), 1992 WL 152982, at *12 (E.D.N.Y. June 26, 1992) (per curiam); *Terrazas v. Slagle*, 789 F. Supp. 828, 833 (W.D. Tex. 1991), *aff'd mem. sub nom. Richards v. Terrazas*, 112 S. Ct. 3019 (1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 648-50 (N.D. Ill. 1991) (examining totality of circumstances, but only after determining that plaintiffs had satisfied the three *Gingles* preconditions).

While the court in *Emison v. Growe*, 782 F. Supp. 427, 435-36 (D. Minn. 1992), refused to apply such preconditions, that opinion provoked a strong dissent, and this Court has noted probable jurisdiction. 112 S. Ct. 1557 (1992). Significantly, the Solicitor General has argued that the *Emison* court erred by failing to apply the *Gingles* preconditions. Brief for the United States as Amicus Curiae at 8-16, *Growe v. Emison*, No. 91-1420 (U.S. May 29, 1992). In the remaining cases cited by the Governor, the parties either did not raise Section 2 issues or entered into stipulations that obviated the need to consider Section 2.

In short, though the court concluded that a plenary Section 2 review was unwarranted, SRAC App. 44, the court did not reject the applicability of Section 2. To the contrary, consistent with both *Gingles* and lower court decisions, the court analyzed the plans it drew and those proposed by the parties "with the goal of providing minorities with an equal opportunity to elect the representatives of their choice in mind." SRAC App. 46. This is exactly what Section 2 requires. 42 U.S.C. § 1973(b) (Section 2 is violated when members of a protected minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").[17]

III. THE THREE-JUDGE COURT PROPERLY DETERMINED THAT, IN DRAWING REDISTRICTING PLANS, IT WAS NOT REQUIRED TO MAXIMIZE MINORITY VOTING STRENGTH

The SRAC's primary argument is that, as construed in *Gingles*, Section 2 required the three-judge court to maximize black voting strength. In the SRAC's view, *Gingles* holds that Section 2 is violated whenever an alternative plan exists that creates more black majority districts than the plan adopted (or drawn) by the court and there is evidence of legally significant racial bloc voting. SRAC J.S. 20; *see also* Gov. J.S. 18-19. The SRAC thus unabashedly argues that *Gingles* requires drawing the maximum possible number of black majority districts whenever such polarized voting patterns exist.

The problem for the SRAC, of course, is that neither the language of Section 2 nor the holding of *Gingles* requires any such thing. Section 2 itself says nothing that would mandate maximization of minority voting strength. By its terms, the statute guarantees protected minorities

[17] Because the court below did in fact give more than adequate consideration to the requirements of Section 2, this Court need not reach the Governor's argument that the court erred by failing to incorporate Section 2 standards into its Section 5 analysis. Gov. J.S. 14-18.

only an equal "opportunity . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), not a maximum number of districts with black majorities.[18] Section 2(b)'s express disclaimer of any right to proportional representation (a system designed to maximize the electoral power of minority voters) further undercuts the SRAC's argument. Indeed, had the court below adopted the SRAC plan, it would have run afoul of the disclaimer, because that plan created 13 allegedly "electable" black majority districts out of a total of 46 (28.2%), Sen. App. 40a, in a State that has a black VAP of 26.9%, SRAC J.S. 5.

Similarly, nothing in *Gingles* requires maximization. *Gingles* holds merely that the ability to create compact black majority districts, minority political cohesiveness, and white bloc voting are "necessary preconditions" to a successful Section 2 claim. 478 U.S. at 50-51. The opinion does not, however, hold that these preconditions are themselves sufficient to establish a Section 2 claim.[19] Nor does

[18] The relevant language of Section 2 is taken directly from this Court's decision in *White v. Regester*, 412 U.S. 755, 766 (1973), and the legislative history makes clear that the 1982 amendment to Section 2 "codifies the holding in *White*, thus making clear the legislative intent to incorporate that precedent and [the] extensive case law which developed around it, into the application of Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 32 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 210. Significantly, the cases construing *White* unanimously rejected maximization. *See, e.g., United States v. Board of Supervisors*, 571 F.2d 951, 955 (5th Cir. 1978); *David v. Garrison*, 553 F.2d 923, 927, 930-31 (5th Cir. 1977); *Major v. Iberville Parish School Bd.*, 536 F.2d 101, 104 (5th Cir. 1976); *Nevett v. Sides*, 533 F.2d 1361, 1365 (5th Cir. 1976), *cert. denied*, 446 U.S. 951 (1980); *see also Voting Rights Act Vol. 1: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. ("Senate Hearings") 1204-09, 1216-26 (1982) (prepared statement of Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights under Law) (discussing the cases cited above and others applying *White*).

[19] These preconditions concern the ability of protected minorities "to elect representatives of their choice." *Gingles*, 478 U.S. at 50. A violation of Section 2, however, requires not only an unequal

Gingles hold that any plan that fails to create the maximum possible number of black majority districts violates Section 2 if racial bloc voting reaches legally significant levels.

No doubt realizing as much, the SRAC relies on Justice O'Connor's opinion concurring in the judgment in *Gingles*. That opinion, however, actually disagreed with the majority's analysis and explicitly stated that the majority "does not acknowledge . . . expressly" that its holding "results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." 478 U.S. at 85 (O'Connor, J., concurring in the judgment). Under these circumstances, Justice O'Connor's opinion can hardly be said to support a right to a plan that maximizes minority voting strength.

The error in the SRAC's position is further demonstrated by the consistent views of lower federal courts that neither Section 2 nor *Gingles* requires the creation of the largest possible number of black majority seats in State or local governing bodies.[20] The Solicitor General has like-

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opportunity to elect such representatives but also an unequal opportunity "to participate in the political process." 42 U.S.C. § 1973(b). *See Chisom v. Roemer*, 111 S. Ct. 2354, 2365 (1991) (all Section 2 claims must allege "an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice") (emphasis in original). Thus, demonstrating the existence of the preconditions, without more, would not establish a violation of Section 2. The failure to prove the preconditions, however, obviates the need for any further inquiry under the statute. *See* Argument II, *supra*.

[20] *See Nash*, 1992 WL 165162, at *5-*6 ("We reject [the maximization] argument for a variety of reasons, foremost of which is the lack of any language in the Act to support this position"); *Quilter v. Voinovich*, No. 5:91CV-2219, 1992 WL 114748, at *5 (N.D. Ohio Jan. 31, 1992) ("We conclude that nothing in § 2 of the Voting Rights Act, *Gingles*, *supra*, or *Armour [v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991),] mandates the drawing of majority-minority

wise stated that "[n]othing in the Voting Rights Act requires state or local jurisdictions to maximize the number of majority-minority districts . . . ." Brief for the United States as Amicus Curiae Supporting Appellants at 12, *Voinovich v. Quilter*, No. 91-1618 (U.S. filed July 31, 1992). Thus, contrary to the SRAC's claims, the three-judge court's opinion does not contravene the language of Section 2 or this Court's decision in *Gingles*.

Moreover, the three-judge court's opinion is consistent with the legislative history of Section 2. Although the SRAC contends that the legislative history approved the use of black majority districts as a remedy for minority vote dilution, SRAC J.S. 21-22, the issue here is not whether such districts are an appropriate Section 2 remedy. The issue is whether the three-judge court was obliged to draw the maximum possible number of black majority districts. Nothing in the legislative history supports such a requirement. Indeed, when the SRAC's counsel testified before Congress in support of the bill that eventually became Section 2, he expressly stated, in an effort to rebut the claims of opponents of the bill, that it was "erroneous[]" to describe amended Section 2 as involving a "requirement of 'maximization' of minority political strength." Senate Hearings, *supra* note 18, at 386-87 (prepared statement of Laughlin McDonald). In short, the legislative history provides no more support for the SRAC's arguments than the statutory language or the case law.

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districts wherever there is a concentration of Black voters"); *Turner v. Arkansas*, 784 F. Supp. 553, 573 (E.D. Ark. 1991) (Section 2 "is not violated by a state legislature simply because that legislature does not enact a districting plan that maximizes black political power or influence"), *aff'd mem.*, 112 S. Ct. 2296 (1992); *Watkins v. Mabus*, 771 F. Supp. at 805-06 (dictum) ("It is doubtful whether *Gingles* held, as plaintiffs suggest, that the amended Voting Rights Act § 2 requires that states go beyond the requirement of non-discrimination in order to create as many non-white majority districts as possible.").

IV. ASSUMING *ARGUENDO* THAT MAXIMIZATION IS REQUIRED, THE THREE-JUDGE COURT SHOULD STILL BE AFFIRMED BECAUSE IT CREATED THE MAXIMUM NUMBER OF TRULY ELECTABLE DISTRICTS

Even if Section 2 required drawing the maximum number of majority black districts (which it does not), the three-judge court's decision should still be affirmed because its plan contains the maximum number of districts that meet Section 2's criteria. Under Section 2, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17 (emphasis in original). Thus, unless Appellants can show that they had the potential to elect candidates of their choice in the additional districts that they contend the court should have drawn, they cannot prevail.

Whether a particular plan provides minority voters the requisite potential to elect their chosen candidates is peculiarly dependent on the facts of each case, and making this determination requires an "intensely local appraisal of the design and impact" of the plan. *White v. Regester*, 412 U.S. 755, 769 (1973); *see Gingles*, 478 U.S. at 79; *Rogers v. Lodge*, 458 U.S. 613, 622 (1982). Appellate courts review the trial court's determinations using a "clearly-erroneous" standard and give deference to the local judges who heard the evidence. *Gingles*, 478 U.S. at 79.[21] The court below did not err when it declined to draw the three additional majority black Senate districts advocated by the SRAC and the two additional majority black Senate districts advocated by the Governor, because the evidence showed that these districts were not truly electable.

Under the *Gingles* preconditions discussed in Argument II, *supra*, to make out a Section 2 claim, minority voters

[21] This standard applies both to findings regarding the *Gingles* preconditions and to the ultimate finding of vote dilution. *Gingles*, 478 U.S. at 79.

must show, *inter alia*, that their group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Otherwise, they cannot prove that the challenged districting plan impairs their ability to elect candidates of their choice. *Id.* Though the SRAC claims that a district must have at least 57% black total population to be electable, SRAC J.S. 8, this approach is inconsistent with the case law, which has recognized that the concentration of black voters required to satisfy Section 2 will vary from district to district depending upon the circumstances.[22] Appellants' approach is also inconsistent with the evidence, which showed that black candidates have been elected in districts that were less than 57% black and white candidates have been elected in districts that exceeded this figure.[23] In short, whether a district can elect a black candidate depends not just on percentages but also on the presence of an incumbent in the district, the district's compactness, and other factors.

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[22] *See, e.g., Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, 1992 WL 152982, at *7 ("the Supreme Court has declined to adopt bright-line formulae for determining whether the VAP percentage of a minority group in a district is so low that a court should suspect dilution of minority voting strength"); *Nash*, 1992 WL 165162, at *10 ("The precise number [of minority voters required for an effective minority district] is a question of fact that may differ depending upon the circumstances."); *Ewing v. Monroe County, Miss.*, 740 F. Supp. 417, 426 (N.D. Miss. 1990) (noting that range of 51-55% black VAP sufficient due to prior minority candidates' success in districts with less than 50% black VAP).

[23] Since 1984, Senator Theo Mitchell, who is black, has been continuously elected from Senate District 7 with a total black population of 50.23% and a black VAP of 45.31%. *See* SRAC App. 68. McKinley Washington, who is also black, was elected in Senate District 45, which is only 54.6% black in total population. Sen. App. 18a-20a. By contrast, Yancey McGill and John Land, both of whom are white, represent Senate District 32, which is 58.15% black, and Senate District 36, which is 63.24% black, respectively. Sen. App. 24a.

Appellants claim that the three-judge court ignored these factors and simply held that any district with more than 50% black VAP was sufficient to provide black voters with the opportunities required under Section 2. SRAC J.S. 25; Gov. J.S. 20-21. In fact, the three-judge court expressly noted that "beyond the use of voting age population, we have considered other factors, such as the presence of an incumbent in a district, in formulating our plans." SRAC App. 49. The court explained that, in a district with a black incumbent, "black voter turnout will be greater than if there is no incumbent running, which will, in turn be greater than if a white incumbent were running." SRAC App. 50.

The SRAC also complains that the three-judge court "refused to consider . . . extensive evidence of racial bloc voting," evidence that the SRAC claims showed that a district with a 50.1% black VAP would not satisfy Section 2. SRAC J.S. 25. To the contrary, the three-judge court did consider the expert testimony offered by plaintiffs and concluded that "the extent to which voting is polarized in South Carolina remains an open question and will certainly vary from locality to locality." SRAC App. 56. In view of *Gingles*' requirement that evidence of racially polarized voting must be district-specific, 478 U.S. at 59 n.28, and the deficiencies in the expert testimony, *see supra* p. 7 and note 8, the court's finding was unquestionably correct. The court nonetheless accepted the parties' stipulation that "since 1984 there is evidence of racially polarized voting in South Carolina." SRAC App. 56. The three-judge court's decision not to draw all of the majority black Senate districts advocated by Appellants was not based on a lack of evidence of racial bloc voting, but rather on evidence demonstrating that the proposed districts were not sufficiently compact, as required by *Gingles*, 478 U.S. at 50.

In determining whether a district is compact under *Gingles*, courts take a "functional" approach, rather than

relying on the shapes of the districts.[24] Under a functional approach, "a district is sufficiently geographically compact if it allows for effective representation," *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988), *i.e.*, if the citizens within the district are able "to relate to each other and their representatives" and the representatives are able "to relate effectively to their constituency." *Wilson*, 823 P.2d at 574. In addition, "the functional aspect of geographical compactness takes into account the presence or absence of a sense of community made possible by open lines of access and communication." *Id.* at 549. "If a district is so spread out that no sense of community exists, then that district is not sufficiently compact." *DeGrandy*, slip op. at 18.[25]

In keeping with the functional approach to compactness, the three-judge court recognized that "the color of

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[24] *See generally DeGrandy v. Wetherell*, No. TCA 92-40015-WS, No. 92-40131, slip op. at 8 ("[T]he proper focus of any geographic compactness analysis is upon the size and relative concentration of the minority population, rather than upon the size or shape of the district."); *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) ("By compactness, [*Gingles*] does not mean that a proposed district must meet . . . some aesthetic absolute, such as symmetry or attractiveness."); *Wilson*, 823 P.2d at 574 ("Compactness does not refer to geometric shapes . . . ."). The functional approach to compactness is consistent with both the legislative history of Section 2 and Justice Brennan's opinion in *Gingles*. 478 U.S. at 48 n.15.

[25] The compactness requirement becomes more important in the case of single-member districts than in the case of multi-member districts or at-large elections. The reason is that, when plaintiffs challenging a multi-member district ask the court to divide it into single-member districts, the proposed districts by definition will always be smaller in area and therefore no less compact than the multi-member districts they replace. By contrast, when plaintiffs challenge a single-member districting plan and ask the court to draw different single-member districts, there is no similar limitation. The proposed districts may stretch all over the State and therefore may be substantially less compact than the districts they replace. In such a situation, the court must take particular care to observe *Gingles*' compactness requirement.

one's skin, in and of itself, does not create a community of interest. Rather, a community's views on crime, employment, education, police brutality, urban sprawl, or urban blight may be just as indicative of a community of interest as whether the members of the community are predominantly black or white . . . ." SRAC App. 54-55 (footnote omitted); *see Wilson*, 823 P.2d at 574-75 (functional compactness "speaks to relationships that are facilitated by shared interests"); *see also* Sen. App. 8a (Senate criteria for drawing districts meant to promote "districts where the people that are in the district will have . . . a collective sense [that] they're a district and they know the issues that are going on that affect that district").

Appellants apparently believe that, so long as it is physically possible to draw a district that is at least 57% black, Section 2 requires that district to be included in any court-drawn plan, regardless of whether it is functionally compact. Such an approach runs directly contrary to the geographical compactness mandate of *Gingles*. 478 U.S. at 50. As the court observed in *Watkins v. Mabus*, 771 F. Supp. at 805, "*Gingles* does not interpret § 2 of the Voting Rights Act to require the creation of majority non-white districts that are not geographically compact." *See also Wilson*, 823 P.2d at 566 ("[S]ection 2 need not control formulation of plans where minority voters are not, functionally, geographically compact").

Contrary to the SRAC's claim that its evidence of compactness was "conceded by the parties and the court," SRAC J.S. 6 n.6, the evidence demonstrated that the additional districts advocated by the SRAC and the Governor did not meet *Gingles*' compactness requirement. As discussed above, the Savannah Valley district (District 10) strung together disparate communities of interest in seven different counties. *See supra* pp. 8-9. The district proposed by the SRAC north of Columbia (District 15) fractured a compact predominantly black area into two dis-

tricts (Districts 15 and 17) and, by splitting precincts, added disparate groups of black voters with no community of interest to increase the black percentage of the population in both districts. *See supra* p. 9. The majority black districts proposed by the SRAC and the Governor in eastern South Carolina likewise disrupted existing communities of interest and diluted black voting strength in adjacent districts. *See supra* pp. 9-10.

Appellants complain that, in determining not to draw additional majority black districts, the three-judge court improperly deferred to "the state policy of recognizing county lines." SRAC J.S. 28; Gov. J.S. 22-25.[26] Contrary to Appellants' claims that the preservation of county lines somehow runs counter to the policies underlying Section 2, courts have held the preservation of political boundaries, such as county lines, promotes the creation of districts encompassing communities of interest, in conformity with the compactness requirement of *Gingles*. As the special masters who drew reapportionment plans for the California Supreme Court explained, preservation of the "geographical integrity of any city, county, or city and county" when drawing legislative districts (as required by that State's Constitution) is entirely compatible with Section 2.

> [U]se of [the California constitutional] criteria reinforces the [Voting Rights] Act's guarantee to minority groups to have an equal opportunity "to participate in the political process." . . . [P]olitical effectiveness can be enhanced by membership and

[26] Appellants' argument cannot be that the three-judge court refused altogether to break county lines in order to enhance minority voting strength, as the court did precisely that in fashioning a majority black Congressional district. SRAC App. 84 & n.78. What Appellants are really contending is that the court should have crossed even more county lines in order to create additional black majority districts in the Senate and the House. This is, essentially, a rehashing of Appellants' maximization argument and should be rejected as such. *See* Argument III, *supra*.

> participation in community affairs: candidates for public office can be recruited and nurtured, local media may be better utilized . . . [and] grassroots organizing and campaigning are more viable.

Wilson, 823 P.2d at 574-75 (citation omitted).[27] Here, by minimizing cuts across county lines, the three-judge court's plan for the Senate served both state policy and the requirement of "racial fairness." SRAC App. 70.[28]

The SRAC's argument that the three-judge court "chose to honor 'South Carolina's traditional and legitimate policies' of protecting incumbents," SRAC J.S. 28, rather than apply the principles embodied in Section 2, is equally

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[27] *See Arizonans for Fair Representation v. Symington*, No. CIV 92-256-PHX-SMM, slip op. at 11-12, 15; *Magnolia Bar Ass'n, Inc. v. Lee*, No. J90-0413(B), slip op. at 29-30 (S.D. Miss. July 15, 1992) (to be reported at 793 F. Supp. 1386) (copy lodged with this Court); *see also Connor v. Finch*, 431 U.S. 407, 430 (1977) (Blackmun, J., concurring) (noting in the context of a challenge on racial fairness grounds to a court-ordered redistricting plan that "[w]here there is an established policy of respecting political or natural boundaries in districting, then I believe that a court may best avoid any appearance of partisanship by using those boundaries as much as possible in its districting"). *Cf. Good v. Austin*, No. 91-CV-74754DT, 1992 WL 173862, at *5 (E.D. & W.D. Mich. July 28, 1992); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 866 (W.D. Wis. 1992); *Wesch v. Hunt*, 785 F. Supp. 1491, 1498 (S.D. Ala.), *aff'd mem. sub nom. Camp v. Wesch*, 112 S. Ct. 1926 (1992); *Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982) ("[P]olitical subdivisions should remain undivided whenever possible because the sense of community derived from established governmental units tends to foster effective representation.").

[28] The three-judge court also noted that its plan minimized the number of split precinct lines. While recognizing that this was "primarily an issue which effects administrative convenience, splitting precincts also has the effect of confusing both voters and potential voters; thus, in some instances, serving to abridge the right to vote or to have their vote counted." SRAC App. 64. Each of the additional majority black districts proposed by the SRAC and the Governor contained split precincts, and the testimony at trial showed that such splits adversely affect black turnout, *see* Sen. App. 2a-5a, thus reducing the "electability" of these districts.

unavailing. In fact, the three-judge court expressly stated that "[a]lthough protecting constituent-representative relations may be a legitimate concern for a legislative body fashioning a plan, this court must act circumspectly and without taint of arbitrariness." SRAC App. 64 (citations omitted). Accordingly, the three-judge court's apolitical treatment of the incumbency issue was entirely proper.[29]

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[29] For example, the court looked at the extent to which the placement of more than one incumbent in a given district indicated "apparent partisan considerations." SRAC App. 65; *id.* at 65 n.61 (criticizing Governor's plan for Senate because it paired ten Democratic incumbents); *see Prosser*, 793 F. Supp. at 871 (noting that court-drawn plan was less partisan than plans submitted by parties because it pitted the least number of incumbents against each other). The court also considered incumbency to determine what impact the race of the incumbent would have on "the effectiveness of the black voting age population." SRAC App. 49-50. The court observed that, to satisfy Section 2, a smaller percentage of black voters was required in a district with a black incumbent than in an open district or one with a white incumbent. SRAC App. 49-50; *see Nash*, 1992 WL 165162, at *10 (noting that determining the requisite minority population size is a multi-factor inquiry).

CONCLUSION

For the reasons set forth above, the appeal and the cross-appeal should be dismissed or, in the alternative, the judgment of the three-judge court should be affirmed.

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Respectfully submitted,

GEDNEY M. HOWE, III, P.A.
8 Chalmers Street
Charleston, S.C. 29402
(803) 722-8048

ANDREW P. MILLER
(Counsel of Record)
MARK A. PACKMAN
MELINDA BURROWS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

FRED THOMPSON, III
SCARDATO & THOMPSON
151 Meeting Street
Charleston, S.C. 29402
(803) 723-9600

Attorneys for Appellee
South Carolina Senate

APPENDIX

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APPENDIX

ARRINGTON—CROSS

* * * *

[Arrington Trial Transcript, p. 27] Q. (By Mr. Howe, counsel for the Senate): And when we look at your report you make some reference to the studies that you have done, you chose as the benchmark for racial polarization in the state the race between Campbell and Theo Mitchell?

A. I did. Simply because it was a statewide race which we could apply to a number of different districts.

Q. And from your perspective, from your analysis, that's the one race you used on these senatorial districts [i.e., the three black majority districts], isn't it?

A. It the only one I used on those three, I did look at a number of other—a number of other Senate races and several [28] House races.

Q. But on the three that you are talking about where the Republicans are creating these districts?

A. That's correct.

Q. You only used that race?

A. I only used that race.

Q. One race?

A. That's correct.

Q. You say in your report these figures are fragmentary and are less than totally reliable, don't you?

A. Yes, the court would not want to base conclusions about racial polarization solely from the data that I presented here. I was well aware that Dr. Loewen was going to come and present information, and since that time I have also seen a very extensive body of incomplete but nevertheless persuasive evidence about racial polarization from Dr. Ruoff's analysis.

Q. Well, when you wrote this, what you wrote a week ago?

A. Uh-huh.

Q. What you were saying when you said that was, "I got some information, but I don't want you to base any

of your decisions on it because it is fragmentary and less than totally reliable?

A. Yes, and when I wrote that a week ago you will notice there is several references to Loewen in that, I knew the Loewen data would be presented.

* * * *

[30] Q. (By Mr. Howe, counsel for the Senate): You worked at the local level in local politics?

A. I have.

Q. I think we all consider that in the trenches?

A. In the trenches.

Q. No doubt about it?

A. No doubt about it.

Q. And that's being there on election day and that sort of thing?

A. Yes, I was the chairman of the Mecklenburg County Board of Elections for six years and a member of that board for 12, so that's very much in the trenches.

Q. You familiar with the problems associated with splitting precincts?

A. Yes.

Q. That does create problems on election day?

A. Yes.

Q. And those problems are burdensome, not only the top, say the chairman level where you are, but particularly burdensome on the people in the [polls], aren't they?

A. They are.

Q. Voters who come often have small amounts of time set aside to vote and can be easily frustrated [into] sort of giving [31] up their franchise, can't they?

A. That's correct.

Q. And if the lines are too long or they are having to try to locate themselves on a map, any little frustration like that can significantly lower voter participation, can't it?

A. Yes.

Q. And that should be avoided, shouldn't it?

A. Should be avoided.

Q. And you would see and agree with me that the splitting of precincts on election day in the face of the individual going to the [polls] to vote can be and often is very inhibiting?

A. Yes.

Q. And should be avoided if it possibly can?

A. Should be avoided if you can avoid it without committing a greater violation.

Q. Where I'm heading is this, if you have been helping with that county you have been a part of some get-out-the-vote movement, haven't you, encouraging people to register, encouraging people to participate—

A. Oh, yes, absolutely, sure, absolutely.

Q. Sure. I mean that's when you have ads and say, you know, "exercise your right," and that's not directed Democrat or Republican, it's "doggone it, get out there and vote?"

A. Our experience in similar situations in Mecklenburg County is that when you are faced with a situation where [32] you have a split precinct, you have to go to extraordinary lengths to prepare for the problems it's going to cause, but it can be handled.

Q. But splitting precincts causes and requires some extraordinary lengths to try to deal with it, to use your language?

A. There's no question that that is true.

JUDGE HAMILTON: Mr. Glenn, Mr. Holleman.

MR. GLENN: Yes, sir, I didn't knew he's through.

MR. HOWE: I'm sorry.

CROSS EXAMINATION

BY MR. GLENN (counsel for the Lieutenant Governor):

Q. Yes, doctor, just on that very subject matter that Mr. Howe was just questioning you, who is more likely to be disadvantaged by the confusion of—that arises according to your testimony from splitting precincts, black voter[s] or white voter[s]?

A. Black voter[s].

Q. So, the consideration given to avoiding splitting precincts comports with the Voting Rights Act of 1965, does it not?

A. Taken all by itself, yes, sir. Now, I can explain it. Sure, if you take any one element like that, absolutely —if for example somebody specifically went through and split or otherwise created confusion in black precincts and not in [33] white precincts that would be a clear violation of the Voting Rights Act, no question about it.

You simply have to balance many different interests here. The first interest in drawing districts is the constitutional one, one person one vote, that will require splitting some precincts. The second requirement is a federal statutory requirement, the Voting Rights Act, and unfortunately that will require splitting some more.

The election commissions will simply have to adjust to that if the court decides you have to split some precincts to follow the Voting Rights Act, and I think you do.

Q. Providing meaningful access to the political process to exercise the franchise is part of the—for citizens of all races, and to protect the minority race is part of the design of the Voting Rights Act; is that correct?

A. Yes.

Q. And voter confusion as a result of splitting precincts is more likely to deny access to a black voter than a white voter?

A. Yes. But again, the denial that comes from fracturing black majorities and putting them in districts where they cannot conceivably be an important influence in that district is a much greater denial than a little bit of confusion on election day.

Q. So, what we have to do is a balancing between the [34] legitimate non-discriminatory state interest in the election process?

A. Yes, you have to balance them, you have to figure out which are the most important.

Q. And unfortunately we have now come to the point where we have laid that at the feet of three judges that

constitute this court to do that balancing, is that where we are in this litigation?

A. Yes.

* * * *

[68] BY MR. HOLLEMAN: (counsel for the South Carolina Democratic Party):

Q. . . . you have made a point of benchmark of the governor's race in the general election in 1990, but you do not have the Democratic primary for governor in 1990, do you?

A. No, I don't.

Q. Which was a statewide race, correct?

A. That's correct.

Q. With a black and white candidate?

A. That's correct.

Q. Both of which were state senators, correct?

A. Yes.

Q. Do you know that the information for that primary is published in the Annual Report of the South Carolina Election Commission?

A. By precinct.

Q. No, by county?

A. I knew it was published by county.

[69] Q. And do you also know—

A. I do not do—I'm sorry, I did not do county by county analysis, I rely on precincts.

Q. Do you also know that the electorate in that primary was approximately 57 percent white?

A. If you say so, I did not know that.

Q. Do you also know that Senator Mitchell won that primary by substantial margin?

A. That I did know.

Q. And that might be a benchmark election too; might it not?

A. It would indeed.

* * * *

COUICK—DIRECT

* * * *

[Couick Trial Transcript, p. 150] Q (By Mr. Howe, counsel for the Senate): Now, as—when the plans were

exchanged in December and subsequently, there have been additional areas that have been pointed to as [prospective] minority/majority districts?

A (By Mr. Couick, Director of Research for the Senate Judiciary Committee): Yes, sir.

Q I would like to go through those with you and we'll start with what we will call the Savannah Valley. Which number is that? Is that ten?

A Yes, sir, that's ten in most of the plans—in all the plans that's ten, yes, sir.

Q Now, did the [Senate Judiciary Committee's] Subcommittee [on Reapportionment] create a [151] majority/minority at ten?

A No, sir, they did not.

Q Why not?

A In all three—there are three plans, as best of my memory, that have a District 10 in them. I believe it's the S.R.A.C. proposal, we kind of call SRAC. The Governor and the Republican Party all have a District 10. All of them are a little bit different. The Republican Party and the Governor's are more black than the S.R.A.C.'s.

Q That doesn't come as any great surprise to anybody.

A We found—or the Subcommittee found based upon staff's review that particularly with the Republican party and the Governor's proposal, there were a number of precincts that were split in the particular district. And they were split mainly in minority precincts that would only add to the voter confusion that we had heard a good bit of testimony about at the [Subcommittee's hearing on] criteria [for drawing redistricting plans] . . . and at other times.

Q Let's digress one second on that. Was there testimony at the Subcommittee hearings specifically on the problems associated with voter precinct splits?

A Yes, sir. It came from almost every quarter in that—committee meetings in particular, we heard from

[152] not only people that you've heard about this week, but we also heard from folks like Senator Joe Wilson saying that there [was] confusion that was caused by precinct splits.

Q In addition to that, did you do some research by calling the Democratic and Republican parties?

A I personally did not do that, but I requested my staff who gave me a report back to call the Democratic Party, the Republican Party and to the State Election Commission, and ask for a recent history of election protests and what most of those precincts—I mean protests involved, and particularly had there been any protests that involved split precincts. And the response that came back was most definitely yes. In fact, most protests that—where there were split precincts within the district had some relationship to the splits.

Q Was it determined—I'm going to go back to 10. Was it determined that the various proposals for District 10 did in fact violate the Senate criteria?

A Yes, sir. For several reasons, we never were able to determine that an electable district could be drawn in that area. We took into account the great geographic stretch of the districts. And that wasn't the determining factor, but when you combine that with [153] the number of split precincts that the splits occurred mainly in heavily black precincts, that there were no unified communities of interest throughout that district, and there was no core of an existing district that that district was built upon, we determined it was going to be hard for that district to be electable at that percentage drawn.

Q Now, let's talk about these districts and I'm not going to do this on each of these districts, I promise.

We agree that the first criteria is equal—one man one vote, and the second one is the Voting Rights Act?

A Yes, sir.

Q How did that play—I mean, do you go to two and then stop? How—contiguity, communities of interest, constituent consistency, precinct boundaries, etc., how are those—and compactness, how do they play together, how

did the Subcommittee play them together in the decision making mix?

A The criteria that the Subcommittee adopted are fairly neutral criteria. I think that if you look at other states and other submissions by the Republican Party and others, they're meant to build good districts, good electable districts, districts where [154] the people that are in the district will have an idea of a collective sense, they're a district and they know the issues that are going on that affect that district.

They're able not only to elect a representative from a cohesive compact district, but they are able to affect that representative once he's elected and offer him comments and have kind of a core sense of issues they're interested in that he'll have to respond to.

Q What I'm getting at is several people have said that you come to the Voting Rights Act, you apply maximization and you don't go further. Is that how the Subcommittee did it?

A No, sir. As I was getting to, those neutral criteria that were meant to create electable districts for any type of the 46 senatorial districts have the same impact in a minority district, a black majority electable district, whatever you care to determine.

It was meant to make those districts where they could be electable, where like communities of interest would be something that would be an asset or an added asset to that district. That if you had a district that was nominally a black district, if it was in a community of interest or in several communities of interests that were related, that would make it a higher quality district in terms of the black representative [155] that was elected being able to participate effectively in the legislative process and also in terms of the folks from where he was elected being able to have input in important and quality input into what he did.

Q What did the Subcommittee determine about the proposed minority/majority district in that area?

A That it was not elect[able].

Q Now, what did it determine as it related to the criteria?

A As to each criteria?

Q Just generally.

A In consideration of black majority, [putative] black majority districts, the Subcommittee never divorced the Voting Rights Act compliance with the other criteria. We never really got to the point of considering the other criteria. Those were not important.

They wanted if possible to draw a black district if it met the first two in terms of equal population and Voting Rights Act compliance, but they viewed the other criteria to have an impact on that Voting Rights Act compliance.

So to the extent that you didn't have a compact district, or it wasn't cohesive or there were no communities of interest, no core district, they didn't go beyond that point. So, they felt like if it did not [156] comply with those first two criteria, it was not electable.

Q When you look—one of the next areas of concern was Georgetown [County] as a prospective district. What district number was—

A Thirty-four, I believe in most plans have denominated that District 34.

Q And did the Republicans, Governor and the N.A.A.C.P. [SRAC] propose a district there?

A In fact, I believe the Lieutenant Governor proposed a district in that area as well.

They all are a good bit different. The Lieutenant Governor tends to take the Senate plan and extend it and adjust some of the other districts beside it.

The N.A.A.C.P.'s way of drawing the district is to shift over Districts 32 and 36 and take part of the black population in Williamsburg County in order to draw District 34.

I believe the Governor and the Republican Party had a little bit different iteration where they pushed District 30 up into Dillon County, and then used some of

the population left over from that shift in order to draw the District 34.

Q What did the Subcommittee determine in that area?

A The determinations on those—on those plans were [157] a little bit different than District 10, because there were so many different ways of trying to draw District 34.

As to the Republican Party, and I could be mistaken that both were alike, but I believe the Republican Party and the Governor were very similar. In terms of their using the black population in Dillon County for District 30, we had ample testimony from Senator Gilbert [the black incumbent in District 30] that that was not a type of population that would give him what he called an electable district.

That—for that reason, you were merely taking one district, District 30, and making it unelectable in order to try to achieve an electable district in District 34. So, it's kind of a trade-off. And I feel that to some degree, the District 34 [in the Governor's plan] was not as electable as the District 30 that was drawn by the Senate.

In terms of the Lieutenant Governor['s] proposal, the V.A.P. is fairly low on that district. I don't believe that it would be an electable district for a number of reasons, including that one reason is it stretches essentially from outside Dillon County down almost into Charleston.

Q And in trying to create a minority district in [158] that area, what did it do to Williamsburg County?

A Well—and that was kind of the approach taken by the N.A.A.C.P. They shifted over and divided Williamsburg County into 4 different districts. And by doing that, they fracture what's kind of already a cohesive core of a[n] [existing] district [District 32] in order to draw that District [34].

And they shifted over also into Clarendon County in District 36, and they kind of—I believe the Subcommittee view, from my understanding of the Subcommittee view, by doing that, they took what were two very highly elect-

able black districts [Districts 32 and 36], and by fracturing every one of them, all three of them, they left open the question whether any of them were electable or not.

Q Now, the next would be up in the Fairfield area [north of Columbia].

A Yes, sir.

Q Now, the Senate added the eleventh district in the Fairfield area, and I believe several of the plans proposed an additional district in that area.

A Yes, sir.

Q And what was the Subcommittee's position on that?

A Mr. Howe, once again, all these plans are a little bit different. The Lieutenant Governor only drew one district in the Fairfield area. That district had a [159] lower V.A.P. than that drawn by the Senate. And for that reason, the Subcommittee felt like that we—the Subcommittee had done a better job of establishing an electable district within the confines of that compact area. In addition, the Lieutenant Governor['s] District, I believe, goes over and takes part of Spartanburg. It still has a lower V.A.P.

And I'm not looking at either the Republican or the Governor's [actually the SRAC's] plans, but the best of my memory is both of them draw two districts that are essentially divided by a line somewhat parallel to I-77. And that that—you can essentially take one district on the right of I-77 that runs from Rock Hill to Lancaster to Camden down into Columbia, taking part of an existing district, District 19, currently occupied by Senator Kay Patterson [who is black]. That's one district out of that area.

They draw another district [District 15] that starts in Fairfield County, runs up, I believe both of them or one of them goes into Newberry, then into—these are cities, City of Newberry, City of Union, and then over into Spartanburg before coming back into the City of Rock Hill, the City of York, and in fact I believe one may go into the City of Gaffney for a small black population.

Q Did the Subcommittee believe it was possible to be [160] true to the criteria and draw two minority districts in that area?

A No, sir. And with the last plans I described that draw two districts, the Subcommittee's view was you had essentially a core district there that could be drawn that was compact and cohesive, a black area. That by doing what these other parties had done, you had fractured that cohesive compact district in two and drawn two districts [Districts 15 and 17] that were highly unlikely to be . . . electable because of the disparity, geographic and in terms of the—how the folks kind of thought of their communities of interest. You would put disparate groups together.

* * * *

[164] Q (By Mr. Howe): Have you run an analysis of the plan other—plans of other submissions involving precinct splits?

A (By Mr. Couick): Yes, sir.

Q And how many does the Governor's plan as amended split?

A The Governor's plan as provided to staff on 12/23/91 as amended most recently contains 122 split precincts.

Q And how about the Republican Party?

A As—it was a proposal made on 12/23/91 as recently amended to include some cleanup, I believe it was back earlier in the year, included 145 splits.

[165] Q And how about the [SRAC]?

A Their submission of 12/23/91 included 65 splits.

* * * *

We have also done an analysis of the total voting population with each of those splits as well.

Q (By Mr. Howe) What does that show us?

A That if you look at the Governor's plan for the Senate, and this one is the same plan I was just describing, its population within the split precincts is 290,730 people. That's approximately 8.4 percent of the total

population of the state. Of these precincts, there are 35—excuse me, 34½ percent black population.

If you look at the Republican—excuse me, the [166] S.R.A.C., N.A.A.C.P., the total number of population within their split precincts is 170,534. That's roughly five percent of the total state population. Of those precincts split, the population is 26.7 percent black.

* * * *

LOEWEN—CROSS

* * * *

[Loewen Trial Transcript, p. 73] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): Okay. And as Mr. Howe asked you, I believe you said you were not aware that District 30 later elected a black senator, is that correct, in 1988?

A. That's correct.

Q. Are you aware that that black senator was elected in a runoff after having finished second in the first race?

A. I am not.

Q. And as to district 45, I believe you also said you were [74] not aware that it later elected a black senator, Senator McKinley Washington; is that correct?

A. In general, just to avoid any drawn out questions, I'm not prepared to testify about any election after 1984 or any candidates after that date.

Q. So, I guess then you are not aware that Senator Washington received approximately 60 percent of the vote, both in the democratic primary runoff and in the general election against white candidates?

A. That's correct.

Q. And looking at District 32, if I could for just a minute, I believe that is the district that includes Williamsburg County, which has been represented by Senator Frank McGill and his son Yancey McGill—are you aware of that fact?

A. No, sir.

Q. You are not aware. But I guess as you see your numbers show that Senator McGill, if you will assume

with me for the moment that was the candidate, received almost 50 percent of the black vote, correct?

A. Yes.

Q. And are you also aware, since I see you have analyzed prior Williamsburg County elections, that if not all, virtually all of the county wide elected officials in Williamsburg County, except for Senator McGill, are black?

A. I do not now remember that, but it's—I don't contest [75] it.

Q. Including, for example, the Sheriff and the Treasurer of Williamsburg County?

A. Okay. If you say so, I believe you.

Q. And that Senator McGill was the only county wide elected white official in that county?

A. Could be.

Q. So, I guess when we look at the three senate districts you have analyzed for 1984 and forward, we find two districts which have since elected, if you assume for the moment these facts are true, black senators, and one district in which 50—the senator who happened to have been white got 50 percent of the black vote, and the other county wide elected officials are black.

Would you say that these, assuming those facts, would you say then that these are districts where the black population of those districts are well able to elect candidates of their choice?

A. Based on what you told me has happened since '84, that seems to be a reasonable statement.

Q. And those are the only districts you have analyzed from '84 forward?

A. Yes.

* * * *

[88] Q. (By Mr. Hunter, counsel for the Governor): Okay. Have you made a study of blacks that have been successful in their elections to the general assembly of South Carolina?

A. No.

* * * *

[101] Q. (By Mr. Hunter): Assume the court should find that it needed to draw remedial districts to assist black communities to have equal opportunity to elect candidates of their choice to the legislature, how would you advise the court or the drafters with regard to the number of seats that should be in any one plan?

A. I would probably look at the various plans—

JUDGE HAMILTON: Now wait a minute, if I understood your question, the number of seats that should be in the Senate plan, the House plan, or the congressional plan is not determined by this court.

MR. HUNTER: The number of minority remedial seats, Your Honor—

[102] JUDGE HAMILTON: Well, that's not what you said. All right.

BY MR. HUNTER:

Q. I'm sorry. The number of remedial seats that should be included in the plan, not the gross total number of seats.

A. Generally, I have been in a position of—when I have been looking at plans, I have been looking at plans already drawn. I have, in a few cases, drawn—been commissioned and involved in drawing my own plans. But generally I would look at the two plans—let's say—I think you mentioned 11 and 14?

Q. 11-let's say 11 and 15.

A. 11 and 15, excuse me. And I would first want to advise the court as to whether I thought all 11 seats were in fact reasonably winnable by minorities, or all 15 seats were reasonably winnable, and I would no that through the analysis that I have already mentioned to you.

JUDGE HAMILTON: Have you done that with respect to any plan that is going to come before this court?

THE WITNESS: No, sir, I have not looked at any plan, no plan has been provided me.

* * * *

LOEWEN—RECROSS

[128] Q. (By Mr. Holleman): Did I understand you to say in response to questions from over here that a—in your opinion a black population of 50 to 65 percent in South Carolina makes an electable black district?

A. Depending on the part of the state and it's electoral history, yes.

* * * *

RUOFF—DIRECT

* * * *

[Ruoff Trial Transcript, p. 8] Q. (By Mr. McDonald, counsel for the SRAC):

What were you asked to do in this case?

A. I was principally asked to assist in drawing maps for the House of South Carolina, House of Representatives, the South Carolina Senate, and the United States Congress.

Q. Now, what criteria did you use in drawing the maps that you drew?

A. The first criteria that we used was to try to build the largest number of districts in which African American citizens would have an equal opportunity, at least an equal opportunity to be elected.

In doing that we pay particular attention to insuring that those districts which currently have African American incumbents, that those districts were solidified, made sure that they were in good shape for reelection.

Secondly, that additional districts which were either currently a majority of African Americans but not really electable, not really districts in which African Americans had an equal opportunity to be elected, could be strengthened and buttressed to provide greater opportunity.

And then to, as much as possible, try to build the influence districts where African American citizens could have some influence on the—on the incumbents when they were elected who presumably would be white incumbents. We also—

Q. Let me stop you there if I may because I want to ask you about one of the earlier criteria that you

indicated that you [9] used. How—how do you define a district, as far as the Senate is concerned, which provides minorities an equal opportunity to elect a candidate of choice?

A. Well, there is—there is no absolutely precise definition. Our general rule of thumb was based on looking at the historical reality of where have black senators been elected, and taking that as a benchmark, seeing that in general the break point was at just about 58 percent.

In districts that were more than 58 percent, with one exception, with two exceptions, African Americans were —were elected, and generally below 58 percent African Americans were not elected. There were one or two exceptions to that.

So that for example in Greenville County, Senate District 7, which is just about an even 50/50 district, it has been Senator Theo Mitchell, an African American, has been elected in that district.

* * * *

[13] BY MR. McDONALD (counsel for the SRAC):

Q. Now, did you give any credence to the prior existing lines in drawing the plan for the Senate that you drew?

A. In general we did not. We did—as a general proposition we did not pay attention to incumbency where—where we were not particularly concerned about building a black district.

I think that on the whole we tried to sort of generally make it in the same area that the existing district was, although I don't think that when you start squeezing in the black opportunity districts that you can very closely do that.

Q. Now, did you attempt to draw the maximum possible number of districts that were majority black for the Senate?

A. The original exercise was to draw the maximum number to see that was possible, after that we then step back and said, "what are the best districts that we can

draw that will produce a fair plan, rather than the maximum number of majority districts?"

It turned out that the number happened to be the same, but they ended up being somewhat different, although they are not the same in our House plan.

Q. Okay. Now, did you take into account in any way whether or not the districts would have open seats, that is seats with no incumbents in them?

A. Particularly where we were trying to create districts [14] that would have black majorities that would be opportunity districts, we tried to create as many of those open seats as possible, oftentimes by putting white incumbents in districts together.

Q. You indicated, I believe, that you attempted to maintain the black majority districts that existed?

A. Yes.

Q. Why was that a concern?

A. Well, first of all to avoid losing what African American citizens already had. And so it was important to us that those districts, that we make sure that those districts were in good shape.

Q. Now, did you take into consideration the incumbency of non-minority members?

A. No.

Q. And why not?

A. We did not think that that was an important issue in terms of—of the interests of a African-American citizens in South Carolina.

* * * *

[15] Q. (BY MR. McDONALD, counsel for the SRAC): Dr. Ruoff, let me hand you Exhibit 111, which I think there has been no objection to, and ask you to explain briefly what that document is.

A. This—this document is a—on the first page it shows the existing senatorial districts and on the second page—and although it's not identified as such on here, I believe I recognize this as coming from the state statis-

tical abstract published by the budget and control board.

It also gives the Senate district numbers, total population, black population, percent black, the over 18 population black, over 18 percent black, over 18, and the percent variance—variation in the 1984 Senate plan.

Q. Now, did you consult that data in making your determination about what constitutes a district that would provide blacks an equal opportunity to elect a candidate of their choice?

A. Yes, I did.

Q. And in what way did you take that data into account?

A. Well, in looking at—in looking at this information, as well as taking into account racial polarization data, which we were aware, we wanted to see what's the real number it takes to get blacks elected, what are those districts in which [16] blacks can get elected and how black are they?

And in looking at that it was—it was fairly clear to us that those districts were generally 58 percent or higher.

Q. And do you know the blacks who are elected in those various districts?

A. Yes.

Q. Now, you indicated that generally blacks got elected in the—

MR. HUNTER (counsel for the Governor): Your Honor?

JUDGE HAMILTON: Yes, Mr. Hunter.

MR. HUNTER: I think it would be helpful if the witness would indicate 58 percent of what?

THE WITNESS: Population, total population.

JUDGE HAMILTON: VAP?

THE WITNESS: No, sir, total population.

JUDGE HAMILTON: Total population?

THE WITNESS: Yes, sir.

MR. HUNTER: He's saying total pop is what I understand?

JUDGE HAMILTON: That's correct.

BY MR. McDONALD:

Q. Can you identify with respect to individual districts and, their racial composition, where that general rule did not apply?

[17] A. Certainly does not apply with respect to Senate District 7 which was a 50.23[% black] district, population.

JUDGE ANDERSON: Is that Theo Mitchell's district?

THE WITNESS: Yes, Your Honor. And also with respect to Senate District number 45, McKinley Washington's district, which was a 54.60[% black district] in the 1980 census.

BY MR. McDONALD:

Q. Are those the only two exceptions to the general proposition?

A. Yes.

Q. What is the racial composition of the other senatorial districts which elected blacks?

A. Okay. Senate District 19, which is Senator Kay Patterson's district, was 58.75; Senate District 30, which is currently Senator Frank Gilbert is the Senator, is 59.30; Senate District 39, which is Senator John Matthews is the incumbent, 59.18; and Senate District number 42 in which Herbert Fielding is a Senator is 59.13.

Q. And that exhausts the number of Senate—

A. There are currently six black Senators, yes.

MR. McDONALD: We would move the introduction into evidence at this time of Exhibit 111.

JUDGE HAMILTON: Without objection.

THE CLERK: Plaintiffs SRAC Exhibit 111 in evidence.

* * * *

[29] A. (By DR. RUOFF): There is also created a new black majority district, an opportunity district in District 34, which includes Marion County, a piece of Horry County, a chunk of Williamsburg County, and some of Georgetown County. And that District 34 is 61.86 percent black.

One of the other things that we sought to do in drawing our plans was to increase the involvement of African-Americans generally in the political process by trying to make sure that, particularly in these low country [Coastal] districts, there would be black representation as much as we could get on as many delegations as we could get it, given the South Carolina practice of having the legislative delegation make many of the important decisions that affect African-Americans.

BY MR. McDONALD:

Q. More precisely, Dr. Ruoff, how would you go about trying to effectuate that concern?

A. Well, for example, Senator Matthews' district includes a piece of Orangeburg County, Dorchester County, Colleton County, Hampton County, Allendale County, and Bamberg County, as well as Barnwell County. Rather than—as for example, the Republican Plan that essentially cuts him off right here and also reduces the number of counties in which Senator McKinley Washington would be on the delegation, if—assuming he were reelected, or whichever person were reelected.

[30] Q. Are there any other examples of how you attempted to do that, that is to maximize black participation in the affairs of the county delegations?

A. Those are a couple of the places where we are most conscious of it, but it also goes to the question of whether we would have, as a general proposition, tried to reduce the number of counties that a—that a black—that an opportunity district might be. And our general inclination was to say that better to draw an opportunity district in more counties rather than in less.

Q. You used the phrase opportunity district, are you referring to a district in which minorities have an equal chance to elect a representative of their choice or something else?

A. That is exactly what we are referring to.

* * * *

[44] Q. (BY MR. HOWE, counsel for the Senate): When you started off drawing I think you told us that the first thing you wanted to do was to protect the existing minority majority districts?

A. Yes, sir.

Q. And once you decided where those were, at that point, after that, the lines became of no moment, the existing lines?

A. Well, the existing lines were not particularly of moment. As a general proposition, after we dealt with building the black districts we wanted to build, the opportunity districts, we generally followed what was in the Senate's Plan, not precisely by any means.

And once you start—you know, when you do cookie cutter and you built pieces and areas and then you start filling in the in between, it's impossible to just take any other plan and just say, "well, okay, let's lay it on."

Q. But you have been very frank with us that your interest, [45] your motivation has been maximizing black representation?

A. Yes.

Q. And so what you did was, you started off without this overlay, you started off with this just colored map under it and then you—

A. No, sir. No sir. I mean, we never used a thematic map as the base for our drawing. We happened to have other computer capabilities that give us the same effect. In fact, our system is a little better in terms of that because we can see population density but—

Q. What I'm getting at is, is that you would have taken and drawn in the black majority districts?

A. Yes, sir.

Q. And had in mind, "how can be enhance those, how can we make those stronger?"

A. (Nods head in the affirmative).

Q. Then you would have looked at concentrations of black population and drawn districts for those?

A. Yes, sir.

Q. And the rest you followed the Senate Plan because the white folks could draw those about any way they wanted to?

A. Well, it's all—it's really more that it's just a lot easier to follow something that is already sitting there.

Q. Okay. Well, what was sitting there, there were several plans sitting there, weren't there? There wasn't just the [46] Senate's?

A. There was also—I think we had seen a Republican plan at that point. I think those are the only two other plans that I had seen.

Q. So, to the extent that the Senate is involved, y'all deferred towards the Senate Plan on the remaining lines that didn't interrupt with your lines?

A. As a general proposition, yes.

Q. Now, you mentioned that one of the things y'all tried to do—if not completely, at least minimize, was splitting precincts?

A. Yes.

Q. And that's something to be avoided if possible?

A. The ideal is not to split precincts unless you have to, and in some places we felt you had to.

Q. But that's why you talked about in terms of being able to get—get the variance down to zero, that you would have to split so many precincts it sort of wasn't worth—it wasn't a good idea?

A. I mean, that's—that definitely is one of the reasons not to try to go down to a zero variance.

Q. On balance, the tradeoff isn't worth it because splitting precincts does cause confusion and does have burdens at the polls on voting day?

A. Definitely so.

[47] Q. Now, as I understand your definition and some previous people's definition, what this is all about is trying to have the black community have some of their

representatives in the various community—in the various bodies, ours being the senate—

A. Yes, sir.

Q. —Officials, are elected officials of their choice?

A. Yes, sir.

Q. They really don't necessarily have to be black, do they?

A. No, sir.

Q. Nobody is proposing that, from a racial perspective, what we are looking for is the majority minority districts so that even under the polarization theory that whoever is up there is really up there speaking the black community's side of issues?

A. Right, and is more important than speaking—I mean, is chosen by black people.

Q. Now, in this state two of those are white?

A. Yes, sir.

Q. And they have particularly high black percentages in their districts, don't they?

A. Yes, sir.

Q. Who am I talking about?

A. Senator Yancey McGill and Senator John Land.

Q. And what are their percentages?

A. Let me dig around here a moment.

[48] Q. I'm supposed to give you this, I think this—

A. I found it.

Q. You got it?

A. Senator Land's percentage in the 1980 before redistricting was 63.24 and Senator McGill's was 58.15.

Q. Those are pretty solid minority majorities?

A. Yes, sir.

Q. And is it fair based on looking at that that both of those gentlemen in fact are the chosen representatives of the black community?

A. No, sir.

Q. And—

A. I have done specific analysis in District 32 which show that while there is substantial black support for

Senator McGill, that only 41 percent of the black population voted for him in the special election in which he was elected.

Q. And so in spite of your first criteria, which you testified was your first criteria, and that is preserving black minority majority districts that already exist, and you have stated that as your first criteria, you then choose to abandon that criteria and to stick these two districts together, don't you?

A. Well—

Q. And to run these two white incumbents against each other?

A. We did that, but the first criteria was not to protect [49] exising black majority districts but existing majority districts in which blacks were being elected.

Q. That's—that doesn't strike you as a little prejudicial?

A. No, sir.

Q. Okay. The Aiken District y'all propose is Number 10?

A. The—Number 10 includes a piece of Aiken, yes, sir.

Q. That's the Aiken to Anderson District?

A. Yes, sir.

Q. And I think you testified already that you don't even contend that to be a particularly compact district, do you?

A. Well, it certainly is not the most compact—

Q. It's not as compact as you would like it to be?

A. I don't think it's as compact as anyone would like it to be, given other circumstances in terms of where the black population lives in the State of South Carolina and how you need to draw lines to accomplish building districts in which African-Americans have an equal opportunity to elect representatives of their choice.

Q. Assuming they don't elect white representatives, because if you are going to do that then you have to change the whole Plan?

A. No, sir, I specifically already testified that in fact Yancey McGill was not the choice of the black community in Williamsburg County, and I have not done an analysis of Senator Land. I suspect we would find that although he has a [50] comparatively large black vote in his district, that it is not a majority black vote when—in a contest against a black candidate.

Q. Now, do you know how many precincts you split to create [SRAC District] 10?

A. I have not counted that up.

Q. Would you disagree with me that it was six precincts that involved 10,324 people, 72 percent of which were black?

A. That's—I'm—six precents probably sounds about right.

Q. How about 10,324 people, 72 percent of which are black?

A. That could be. I mean, it doesn't sound way off to me.

Q. Well, for the court's background, that's very normal information from the computer?

A. Sure.

Q. I mean, it's pretty amazing but you can sit down and move that little mouse around and figure that stuff out pretty quickly, can't you?

A. Not using a mouse.

Q. However you do it.

A. But you can figure it out pretty quickly.

Q. Georgetown is District 34?

A. Part of Georgetown is District 34.

Q. That's where you all propose to create another minority district?

A. Yes, sir.

[51] Q. And is District 32 next to that?

A. Yes, sir.

Q. Now would you disagree with me that you split three precincts in District 32 involving 3,642 voters, 81 percent of which are black?

A. That could be, yes.

Q. And then in 34 you split two precincts involving 1,591 voters, 85 percent of which are black?

A. When you are saying the 85 percent figure, I'm not clear on whether you are saying after we split it that the precinct was 85 percent in that district, or that it was 85 percent—they were 85 percent before they were split.

Q. I'm saying that of that 1,591 people, 81 percent of those people are black that you affected.

A. Yes, sir.

Q. Now, if you don't create the Georgetown District, Williamsburg County as a community of interest is left intact, isn't it?

A. It is possible to draw it intact, yes.

Q. If you don't create the 34th District, if you follow the Senate Plan and don't create that minority district, isn't Williamsburg County as a community of interest kept intact?

A. I don't recall whether all of Williamsburg is in—I mean, certainly the bulk of it is, but I don't recall whether all of it is.

[52] Q. And I'm not thinking so much about county lines but the community of interest of Williamsburg would be left intact. If you create District 34, Williamsburg County under your plan is cut into four separate districts, isn't it?

A. I belive that may be true, yes.

Q. And Georgetown, the community of Georgetown is cut into three separate districts to create 34, isn't it?

A. 34 and 33—is there a piece of 32 in there?

Q. Look and see, I have been so advised.

A. Yes, there is around the Andrews area.

Q. And so it's not just the pebble in the water when we say, "gee, let's put a minority district in Georgetown and call it 34," the pebble causes ripples, doesn't it?

A. Every change you make causes ripples.

Q. No doubt about it. And the ripples of 34 involve precinct divisions?

A. Some.

Q. Cutting the community of interest of Williamsburg into four districts and cutting the community of interest in Georgetown into three, those are just some of the ripples, aren't they?

A. It cuts Williamsburg into four, it cuts Georgetown into three.

Q. And it dramatically changes Districts 36 of Land and 32 of McGill, doesn't it?

[53] A. Yes.

* * * *

[70] BY MR. HOLLEMAN (counsel for the South Carolina Democratic Party):

Q. Now, I believe, for example you said if I recall, that your conclusion as to one of the upstate districts that has been drawn as a majority black district [District 15], that there was racial polarization based on your study of the Town of Gaffney [which is located in that proposed district]?

A. That was one of the pieces that went in, yes.

Q. Now, if I could just look at that study for a minute with you—and I believe that is the only study you did in connection with that one district?

A. Actually no, because I have also done analysis of Union which is—

Q. Union, all right, we will get to that, Union is in here too. The Town of Union and the Town of Gaffney. All right, let's assume for a minute the Town of Gaffney is relevant to [71] the entire Senate district.

A. Yes.

Q. Now, as I understand it if you read across here you have got the race of the candidate for the City of Gaffney, that says black, it's the first group. You have got the race they run for, school board?

A. Yes, sir.

Q. Then you have got the year, you have got the name of the candidate—and I'm going to skip over the ecological numbers, I'm just going to get to hard numbers—then you have got the percentage of the blacks who voted —who voted for that candidate, correct?

A. No, the percent who went to the polls that day. They may not have voted in that election.

Q. Okay. So, you've got the percent of the voters who went to the polls that day—

A. Yes.

Q. —who voted for that candidate?

A. Yes.

Q. Okay. And then you've got the percentage of the whites who went to the polls that day who voted for that candidate?

A. Yes.

Q. And then you got the total absolute number of votes that person got?

A. Yes, sir.

[72] Q. Okay. Now, I may be reading it wrong but let's look at '84 for—you go with '80 and '82 and go back to '74, but let's look at '88.

A. Yes, sir.

Q. Now, is this an at-large school board election in Gaffney?

A. I believe it was.

Q. All right. You know that Gaffney is a majority white town?

A. Yes.

Q. All right. Could you tell me who was the largest vote getter in the 1988 Gaffney school board election of either race?

A. I'm having trouble reading my copy so it might be Green, but I believe it is the black candidate.

Q. Mr. Roseman, right?

A. Yes, although that is a fairly common phenomenon that you encounter when you have—there's a couple of reasons for it, one of which is that there is a whole lot of white candidates so that the white vote gets severely split. The other phenomenon that you see is that, of course, the black voters cast almost all their votes that were cast for Roseman—

Q. All right. Well, let me—

A. And so frequently what happens is, there will be one black candidate in a—in an at-large situation that the white [73] community is prepared to support at some level, although almost never at a majority level, and you will see that even though Roseman has been three times elected in this study, that only once did he get a majority of the white vote.

Q. In 1984 Mr. Roseman got 52 percent of the white vote?

A. That's right. That's right.

Q. So, had only whites been voting he would have been elected?

A. Yes.

Q. And let's just follow this through a little bit more, in 1988 Mr. Roseman got 62 percent of the blacks who voted for him, right?

A. Yes.

Q. And 43 percent of the whites?

A. Yes.

Q. A bi-racial coalition?

A. Well, he got the votes from both sides of the aisle, yes.

Q. All right. And then if you turn over to look at your white candidate in that same election, is not the second highest vote getter in '88—

A. I think it's Green at the bottom.

Q. Mr.—no, let's see, okay, is Mr. Green—and Mr. Green got what—he's a white candidate, right?

A. Yes.

Q. What percentage of the black vote did he get?

[74] A. 65.

Q. He got 65 percent of the black vote?

A. Yes.

Q. Mr. Roseman got 62. And then what percentage of the white vote did he get?

A. 38.

Q. So, for the number 2 candidate, a higher percentage of the black people voted for him than the white people; is that correct?

A. In this one candidacy, yes.

Q. All right. Let's look at the third candidate. Let's see, who—

A. Mostetler.

Q. Mostetler. Now, Mr. Mostetler got 34 percent of the black vote and 41 percent of the white vote; is that right?

A. Yes, that's correct.

Q. Sort of equal, another bi-racial coalition, correct?

A. Well, it's not exactly equal but there is clearly votes from both communities there, although you need to recognize that blacks only had one opportunity to vote for blacks in that election—

Q. Well, now, if I look back at your list you have got three black candidates listed Copeland, Goodelock and Roseman (phonetic)?

A. That's correct, I'm sorry.

[75] Q. So, the blacks had several opportunities?

A. Right.

Q. And in fact they only voted 50 percent of the time for Mr. Copeland and Goodelock who were black, but voted 65 percent of the time for Mr. Green, who was white?

A. Yes, and that occasionally will happen. I mean, it is not our position that black folks are not—cannot vote for white folks and that they are not entitled to make their choice a white person, the question—

Q. They can elect—

MR. McDONALD: I object, let the witness finish.

MR. HOLLEMAN: Okay.

A. The question is, who is the candidate of choice of the black community? If you look, for example, at Republican primary data in—or Republican general—general election data for county council in Richland County, there is a black candidate, Gus Roberts—

BY MR. HOLLEMAN:

Q. I will ask you about that in a minute, but I would like to focus on one thing at a time, if I can, since you said Gaffney was your key to concluding, along with Union, that one district was racially polarized, let's focus on this. Not only do the blacks vote for the white candidate, but the whites are voting for the black candidate?

A. In that particular situation, yes.

[76] Q. And then if we look at 1984 again with Mr. Roseman, who apparently was the only black candidate for school board that year, he got, as you said before, over half the white vote. And again he was the top vote getter for the City of Gaffney; is that correct?

A. Where are we at?

Q. Your chart, Mr. Roseman in 1984, 52 percent of the white vote; is that correct?

A. Yes.

Q. And he was the top vote getter again?

A. Probably, yes.

* * * *

[79] Q. All right. Then, if we look at the City of Union [which is also part of the SRAC's District 15] in the 1986 city council race which you have picked out—now, the way I read that, Mr. Glenn, a black candidate—City of Union by the way is majority white; is that correct?

A. Yes.

Q. Mr. Glenn, a white candidate—I mean, a black candidate [80] was a leading vote getter for city council with 870 votes?

A. Yes.

Q. Now, one thing I don't understand is you have him getting 114 percent of the black, how did Mr. Glenn manage that?

A. One of a few things happened. One of the problems in doing an analysis of a place like Union is that you only have a small handful of precinct and so that

makes it a little more difficult—well, it makes it considerably more difficult to be very precise in your estimates, and also if upon occasion—if the relationship is not absolutely a straight line but somehow curves, then you will overestimate.

Q. Okay. Let's look at—I'm just sort of going through your data here, as I tried to last evening, look at Kershaw County?

A. Although I would point out to you while Mr. Glenn got basically all the black vote, he only got 22 percent of the white vote.

Q. But the black voters in the City of Union were able to elect the candidate of their choice?

A. In that election, yes.

Q. In a majority white—

A. Yes.

Q. —City?

A. Yes.

* * * *

[87] Q. [By Mr. Holleman, counsel for the South Carolina Democratic Party]: All right. Now, if we could turn for a minute to Williamsburg County because that is involving one of the senate districts here [District 34].

If you look at your data, it's correct to say that in general for county offices you have racial block voting, correct?

A. Highly polarized.

Q. Correct. But what makes this peculiar for a Voting [88] Rights Act case to make this point is that when you have block voting in Williamsburg County, the black candidate wins?

A. Yes.

Q. In fact, they win the Sheriff and Coroner—I mean, Probate Judge and Treasurer of Williamsburg County?

A. Yes.

Q. But there is an example—an exception?

A. Yes.

Q. And that is the McGills, correct?

A. Well, except that the McGills are not the candidate of choice of the black community, but the vote is split, and as a result the candidate who gets the majority—generally gets the majority of the black vote does not get—does not win the election.

Q. Well, when you say Mr. McGill and his father were not the choice of the black community, you are saying that he was—he was the choice, however, of 40 to 50 percent of the black communiyt, he and his father?

A. Yes.

Q. Correct?

A. Yes.

Q. And these statistics show that if the black community wants to vote as a block to elect somebody in Williamsburg County, they can do it and they have done it over and over and over again?

[89] A. No doubt about it.

Q. But for the Senate, when Mr. McGill is running against Mr. Pasley or Mr. Richardson, Mr. McGill or his father win?

A. That has been the experience, yes.

Q. And isn't the lesson from this not that a black senator can't be elected from this district, but that Mr. Pasley and Mr. Richardson can't beat Mr.—either of the McGills?

A. I think that that's true. But that doesn't mean that another black candidate couldn't.

Q. Might be able to beat them, that's right. If a better black candidate ran who maybe wasn't from Hemingway, was from Kingstree, he might be able to win. Isn't that a fact?

A. Yes.

Q. And in fact in Williamsburg County, the Democratic County Chairman is black and has been for some time; is that right?

A. I don't know who the Chair is now, Ken Kennedy used to be.

Q. Used to be. In fact, he was just elected to the House when Mr. Gordon's seat became open due to his conviction?

A. Yes.

Q. And Mr. Kennedy is black?

A. Yes.

Q. And his predecessor was Mrs. Selma Connors who was black, correct?

A. Could be.

[90] Q. And isn't it true that the vast majority of poll workers in the democratic primary in Williamsburg County are black?

A. I have—

Q. You don't know that?

A. I don't know it for a fact, it wouldn't surprise me in the least, but I don't know it for a fact.

Q. I guess my point is some people might look at Williamsburg County and say, "this is a poor county, poor black population affected by discrimination," correct?

A. Yes.

Q. That would be your conclusion socioeconomically, correct?

A. Yes.

Q. But at the same time this very same socioeconomically deprived black community is well able to exercise political clout when and where it wants to, correct?

A. It has been able to, yes.

* * * *

[93] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): Now, let's—I would like to talk with you for a minute about the specific districts you have talked about. You mentioned this Savannah River District?

A. Yes, sir.

Q. And I believe you said your conclusion as to racial polarization there is not based on any of your analysis, you didn't analyze any—

A. I haven't analyzed any communities there, no, sir.

[99] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): Now, in Georgetown County is another one of these areas you said you assumed was racially polarized, correct?

A. I don't believe that I testified to that but—

Q. Do you?

A. It would be consistent with the other things I have looked at on South Carolina.

Q. But you have not done any study of any areas of Georgetown County?

A. No.

Q. Now, I believe—are you aware of a Mr. Ralph Wilson who won the solicitor's race in Georgetown and Horry Counties this past time?

A. Yes, sir.

Q. And he is black, correct?

A. Yes, sir.

Q. And he won the democratic primary and the general election, correct?

A. Yes, sir.

Q. And the solicitorial district he ran in was, what, 30 percent black?

A. Yes.

Q. Includes that area?

A. (Nods head in the affirmative).

* * * *

[64] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): Now, given the standard that you were using as I heard it described to Mr. Howe this morning, the standard you looked at is the percentage you thought that was necessary for a district to elect a black senator; is that correct?

A. Yes.

Q. Okay. And you said that number was 58 percent?

A. As a general proposition, yes, but, I mean, clearly there are a couple of exceptions.

Q. And you base that because you said historically most of the black senators who were elected were elected from districts that had 58 percent or more?

A. Yes.

Q. And by most you meant four of six?

A. Right, there haven't been a lot.

Q. Which meant two of six, one-third were elected from districts less than that as of the 1984 census?

A. Yes.

Q. And as of the 1990 census, in fact, isn't it true that Senator Kay Patterson's district has declined 56 percent?

A. I have not seen those, I have not done analysis. I know they exist, but I have not seen it.

Q. Well, if you assume with me that is a demographic fact [65] which can be checked, that would then mean half of the sitting black senators now represent districts that have below 58 percent in black population?

A. If that's true, yes.

Q. And I believe under the 1984 census, or the 1984 redistricting, there were four districts that had 50 to 58 percent of black population, correct?

A. I'd have to look at that.

Q. Two of those elected—have elected black senators, one being Senator Theo Mitchell and one being Senator McKinley Washington?

A. Yes.

Q. In fact, Senator Theo Mitchell's district as of 1990 has only 48 percent black voting age population?

A. That's about right, yes.

Q. And he has been elected twice to the state senate from that district; is that correct?

A. That's true, although Dr. Loewen's testimony showed that, you know, upstate districts are less polarized.

Q. I think he even assumed there wasn't a black senator from Greenville County, didn't he?

A. I don't recall him making that assumption.

Q. All right. Then also if you look at Senator McKinley Washington who is not from an upstate county?

A. No.

[66] Q. His black voting age population is 50.8 percent, isn't that right, today?

A. That could be.

Q. And then of the other two districts that had 50 to 58 percent, they elected Senator Marshal Williams and Senator Isadore Lourie, correct?

A. Yes.

Q. And I believe as you said you have been active in the political process of South Carolina, particularly the midlands, that's a correct statement, is it not?

A. Yes.

Q. And don't you know from your own experience that Senator Lourie is a senator who has attracted a great deal of support from the black community?

A. He has historically had considerable black support, yes.

Q. And in fact he's been a senator who has been viewed as extremely responsive to the needs and desires of the black community?

A. Senator Lourie is basically a good guy, yes.

Q. Okay. And in fact both Senator Lourie and Senator Williams and these other senators were elected from districts that were precleared by the Justice Department under the 1984 plan, correct?

A. I believe so. I'm not sure.

Q. Now, in fact, if we look at Senator McKinley Washington, [67] are you aware of the fact also that he received 60 percent of the vote in the democratic primary?

A. I have not looked at his primary vote total.

Q. Are you aware he was running against, I believe, Mullins McLeod, the brother of the retiring incumbent senator?

A. Yes.

Q. Who had once run for Congress himself, I believe?

A. I—it's my vague recollection that that's true.

Q. And then if we look at the districts that met in 1984 at least your criteria of above 58 percent, we find of those, two of them elected white senators?

A. Yes, sir.

Q. And I believe although you said that Senator McGill only got 40 percent, Yancey McGill, of the black vote, his father at one time got almost 50 percent, or 50 percent, did he not?

A. In one race he got right at 50 percent of the black vote.

Q. And I think that was in the 1984 race, was it not? Do you remember?

A. I have got it here.

Q. I believe if you look at the last page of your—

A. Right, that's where I'm looking at, that's 1984.

* * * *

[98] Q. (By Mr. Holleman, counsel for the South Carolina Democratic Party): And then as to this district down here with Senator McGill and Senator Land, what you have done is you have moved one of them from a black majority seat and put them both in a neighboring black minority seat?

A. Yes.

Q. Would you have done that if they had been black senators?

A. No.

Q. You did it purely because they are white senators?

A. And because it allowed us to create an open seat in which a black candidate could be elected.

Q. But if there had been a black senator there you wouldn't have tried to create an open seat?

A. No.

* * * *

[34] Q. Now, just give me the gross comparison under the various plans that you have analyzed. How many districts are created which provide in your opinion an equal opportunity to the minority community to elect candidates of choice?

A. We believe that our plan has 13 of those districts, that the Senate passed plan has nine, that the Lieutenant Governor's plan has seven, that the Governor's plan has 12, and that the Republican Party's plan has 13.

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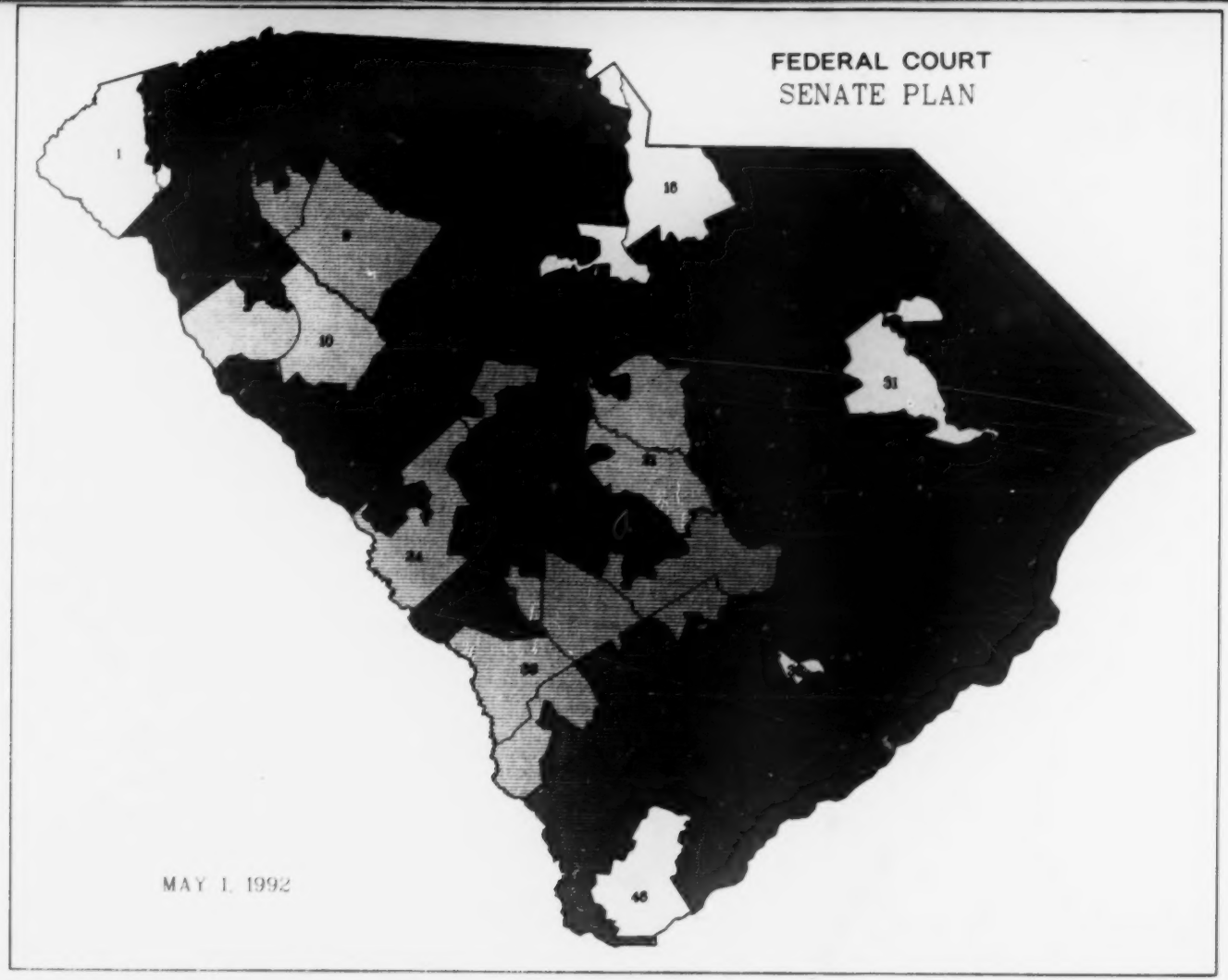
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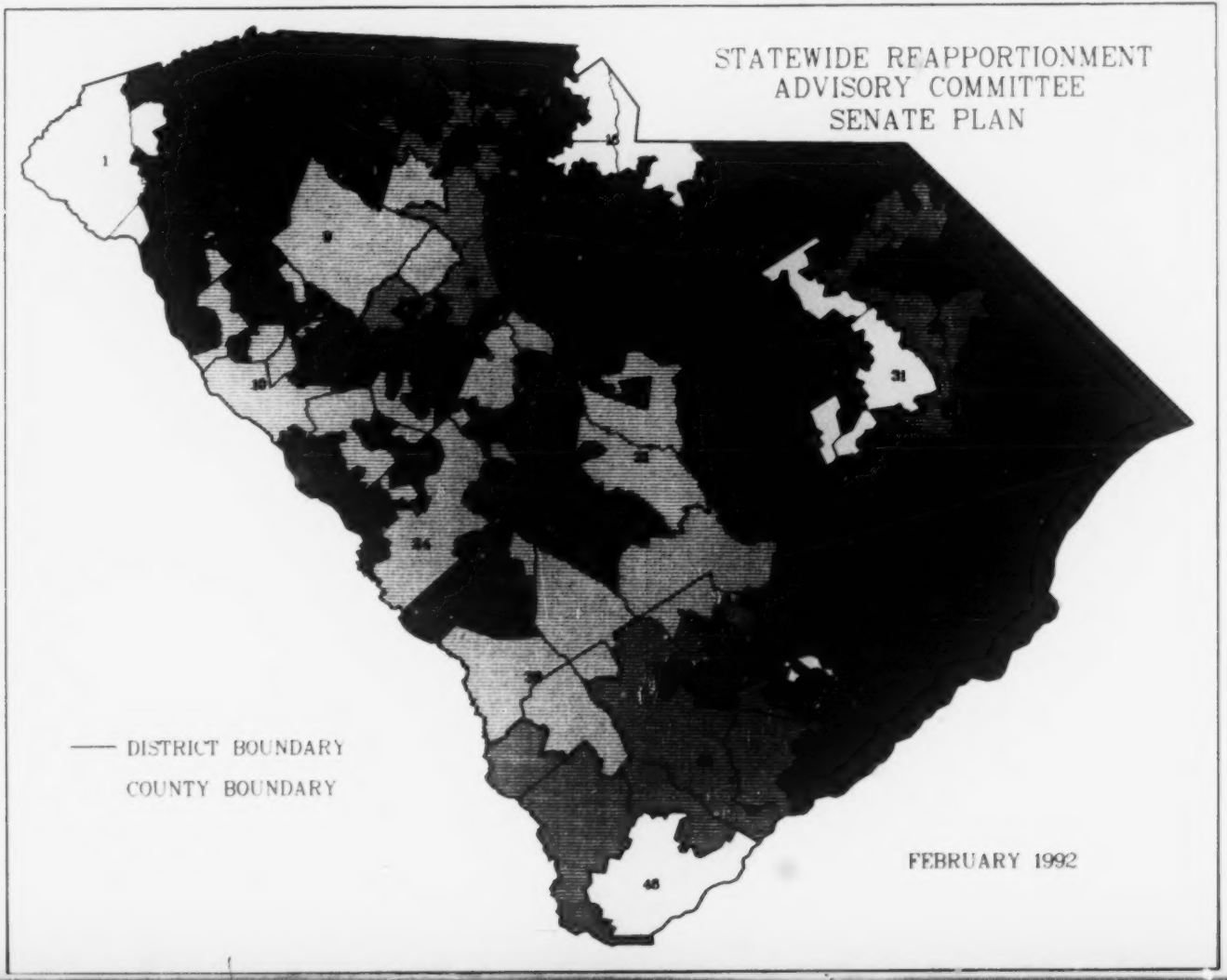
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COUNTY BOUNDARY
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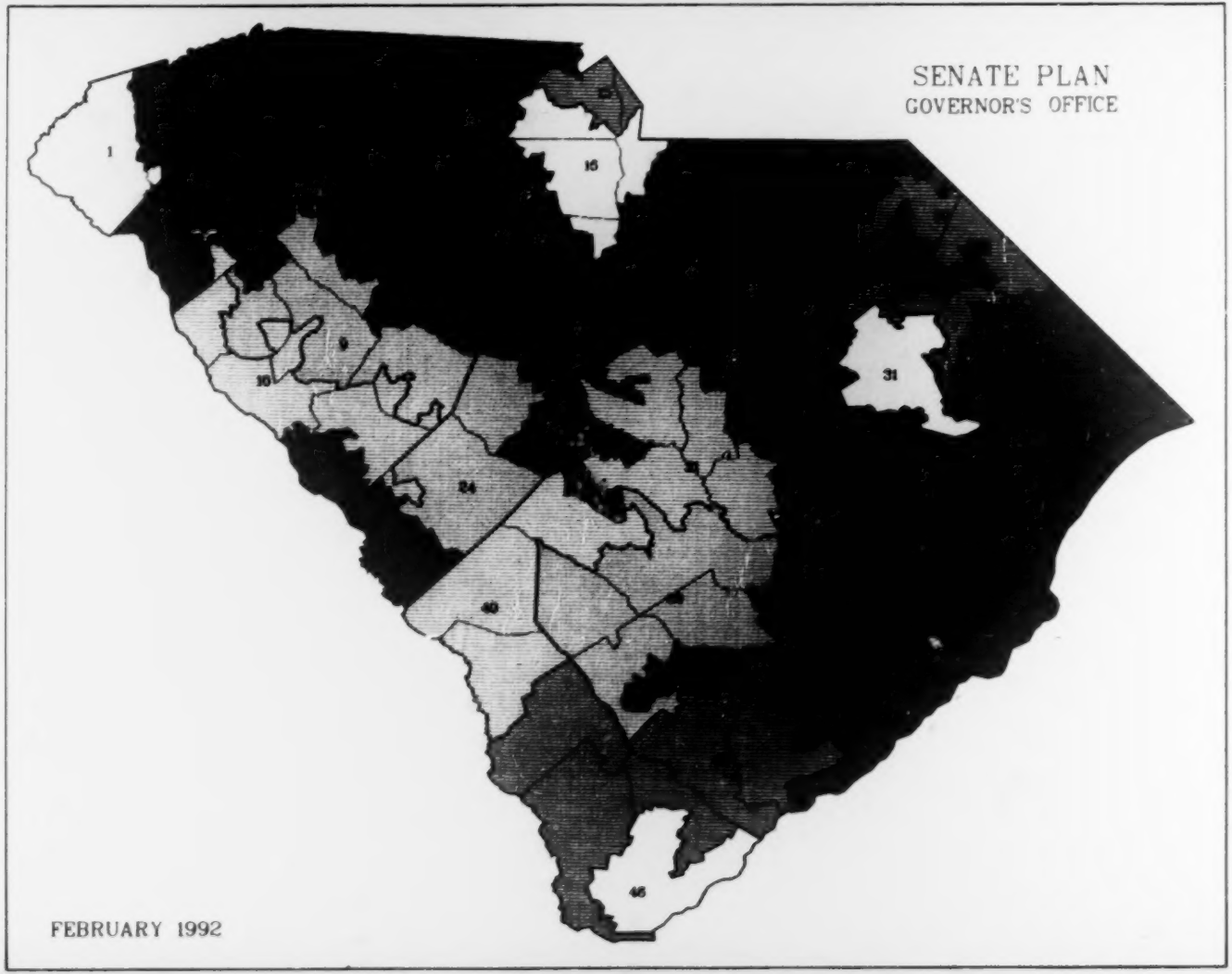
SENATE PLAN
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